83-458

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, and UNITED STATES DEPARTMENT OF AGRICULTURE, PETITIONERS

v.

COMMUNITY NUTRITION INSTITUTE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act of 1937 provides that a handler regulated by a market order issued pursuant to the Act may challenge that order in an administrative proceeding before the Secretary of Agriculture (7 U.S.C. 608c(15)(A)). The Act further provides that if a handler is dissatisfied with the Secretary's decision, he may then obtain judicial review of that decision in the appropriate federal district court (7 U.S.C. 608c(15)(B)). The questions presented are:

1. Whether this statutory scheme for reviewing market orders precludes judicial review of milk market orders at the behest of ultimate consumers of milk products, who are neither regulated handlers nor producers, the direct beneficiaries of the market orders.

2. Whether ultimate consumers of milk products, who assert interests that are either antithetical to the interests Congress sought to promote in the Act or are not implicated by the market orders challenged in this litigation, lack standing to maintain this lawsuit.

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption, Deborah Harrell, Ralph Desmarais, Zy Weinberg, and Joseph Oberweis were plaintiffs in the district court and appellants in the court of appeals, and are respondents here. The National Milk Producers Federation, the Associated Milk Producers, Inc., and the Central Milk Producers Cooperative were granted leave to intervene as defendants in the district court, appeared as appellees in the court of appeals, and, pursuant to Rule 19.6 of the Rules of this Court, are respondents in this Court.

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The Solicitor General, on behalf of the Secretary of Agriculture and the United States Department of Agriculture, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-44a) is reported at 698 F.2d 1239. The opinion of the district court (App. G, *infra*, 53a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 45a-46a) was entered on January 21, 1983. A petition for rehearing was denied on April 19, 1983 (App. E, *infra*, 50a).[1] On July 8, 1983, the Chief

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[1] The government's petition for rehearing was denied on March 28, 1983 (App. C, *infra*, 47a). The time for filing a

Justice extended the time for filing a petition for a writ of certiorari to and including September 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, are set forth in Appendix H, *infra*, 69a-95a.

STATEMENT

This case concerns the jurisdiction of a federal district court to entertain a challenge to market orders by unregulated ultimate consumers of milk products who are nowhere included in the statutory scheme for administrative and judicial review of market orders and whose asserted interests are antithetical to the interests Congress sought to promote in the statute.

1. a. Section 8c of the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. 608c, authorizes the regulation of numerous agricultural commodities and products, including milk. One of Congress' primary purposes in enacting the AMAA was to end destructive price competition in the dairy industry, the structure of which "is so eccentric that economic controls have been found at once necessary and difficult." *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 529 (1949).

The ruinous competition among dairy farmers that concerned Congress centered on fluid milk sales because such sales bring higher prices than do sales of milk for "surplus" use, *i.e.*, use in manufacturing

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petition for a writ of certiorari did not begin to run, however, until the court of appeals denied the petition for rehearing filed by the intervenor-appellees. See Rule 20.4 of the Rules of this Court.

butter, cheese, and other milk products. See *Zuber* v. *Allen*, 396 U.S. 168, 172-176 (1969); *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 548-550 (1939); *Nebbia* v. *New York*, 291 U.S. 502, 515-518, 530 (1934).[2] One of the principal tools Congress used to correct this problem and to guard against its recurrence was the market order system authorized by 7 U.S.C. 608c. The "essential purpose of [the market orders regulating commodities is] to raise producer prices." S. Rep. No. 1011, 74th Cong., 1st Sess. 3 (1935). With respect to milk, such orders provide a method by which the benefits of the desirable fluid milk market and the burdens of the surplus milk market are fairly and proportionally shared among all dairy farmers supplying a given market. See *Nebbia* v. *New York*, *supra*, 291 U.S. at 517-518.

Under the authority of the Act, the Secretary has issued 46 milk market orders, each encompassing a different region of the country (see 7 C.F.R. Parts 1001-1139). The orders establish minimum prices that handlers (those who process the raw milk) must pay to producers (dairy farmers). The prices are determined according to a classification system based on the end use to which the raw milk is put by the handlers. See 44 Fed. Reg. 65990 (1979). If the milk is used in hard manufactured products such as cheese,

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[2] Fluid milk must be consumed relatively quickly after it is produced because it is a naturally fertile field for the growth of bacteria. If it cannot be marketed quickly in fluid form, it must be manufactured into cheese, butter, powder, or other milk products that can be stored for longer periods. Milk that cannot be disposed of in fluid form is referred to in the trade as "surplus," and it commands a lower price than fluid milk because it is manufactured into products that compete directly with similar products from across the nation. See App. A, *infra*, 3a.

butter, dry whole milk, or nonfat dry milk, a handler pays at least the Class II minimum price (*ibid.*).[3] For milk used as fluid milk, a handler pays the higher, Class I minimum price (*ibid.*). Under all but three of the market orders, all handlers' payments for regulated milk used in the different classes are pooled, and farmers are paid from the pool on the basis of the weighted average price received for milk in all uses—the "blend price" (*ibid.*). Thus, handlers pay according to use, as required by 7 U.S.C. 608c(5)(A). Farmers, on the other hand, receive a uniform, blend price, as required by 7 U.S.C. 608c(5)(B), and no longer have to engage in counterproductive competition for fluid milk sales.

b. Reconstituted or recombined milk is manufactured by mixing milk powder with water. See 44 Fed. Reg. 65990 (1979). Consumers can purchase milk powder and reconstitute it themselves by mixing it with water. Such milk powder is not the subject of this litigation. Instead, respondents brought this action to challenge the market order regulation of milk that a *handler* reconstitutes into fluid milk.

Since 1964, the Secretary has treated handler reconstituted fluid milk as a Class I product in order to ensure the integrity of the end use classification system. See 29 Fed. Reg. 9010 (1964). The Secretary reconsidered the issue in 1968 and again determined that regulation of reconstituted milk was required to assure uniform and adequate minimum prices and to prevent the recurrence of destructive competition among farmers. The Secretary explained (34 Fed. Reg. 16883 (1969)):

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[3] Some market orders contain a three-class pricing system. For all practical purposes, however, this case concerns only the difference between Class I and Class II prices (see App. A, *infra*, 3a n.7).

Primarily the problem relates to the conversion by a handler of a product, such as nonfat dry milk, normally priced as a surplus use into another product for Class I use. In addition, the possible entrance into the market of reconstituted products from unregulated sources enlarges the problem.

The potential of these conditions for disruptive influence on the market for producer milk is extremely serious because disposition of a product for a Class I use but pricing it in a surplus price class undermines the classified pricing system.

* * * * *

The objectives of classified pricing are uniformity of pricing according to form or use and providing an adequate return to producers for the fluid market. Therefore, the widespread disposition of filled milk made from reconstituted skim milk, if the skim milk were not subject to some "equalizing" payment, could lead to total defeat of such objectives. Certainly, the classification and pricing plan should protect the Class I market from the potential effects of competition with products produced from the market's own surplus or similar products produced elsewhere at a manufacturing price when used in filled milk.

* * * * *

In this case payment to the producer-settlement fund at the difference between the Class I price and surplus price is necessary not only to assure competitive equity among handlers but also to insure the integrity of the classified pricing system as a means of assuring reasonable prices to producers.

Accordingly, each of the regional milk market orders defines reconstituted milk that is used for drinking purposes as "fluid milk," thereby including it in Class I (see 44 Fed. Reg. 65990 (1979)). Under this

system, handlers pay at least the minimum Class I price for all milk products used for fluid consumption. Thus, if a handler dries the raw milk received from a producer, then reconstitutes it and uses it as fluid milk, it is priced as a Class I product. If, however, the handler dries producer milk into powder and stores or sells it as powder, the powder is priced to him as a Class II or Class III product.[4]

2. The Secretary issues a market order only after rulemaking proceedings that include public notice and the opportunity for a hearing (7 U.S.C. 608c(3) and (4)). The evidence introduced at the hearing must show "that the issuance of such [proposed] order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity" (7 U.S.C. 608c(4)). But before a milk market order can become effective, it must be approved by the handlers of at least 50% of the volume of milk covered by the proposed order and two-thirds of the dairy producers in the affected region (7 U.S.C. 608c(8)). If the handlers withhold consent, the Secretary may nevertheless impose the order if he determines that it is "the only practical means of advancing the interests of the producers" and two-thirds of the producers consent (7 U.S.C. 608c(9)(B)). An order may be terminated by the Secretary (7 U.S.C. 608c(16)(A)) or by a majority of the producers in an order area (7 U.S.C. 608c(16)(B)).

Because this statutory scheme gives handlers considerably less control than producers over the adop-

[4] In part, this pricing system is accomplished through a series of assumptions and adjustments known as "down allocations" and "compensatory payments" (see 45 Fed. Reg. 75956-75957 (1980); App. A, *infra*, 4a-5a). The operational details of the pricing system are not relevant to the issues raised at this threshold stage of the litigation.

tion and retention of market orders, the Act expressly provides for administrative and judicial review of market orders at the behest of handlers. Specifically, 7 U.S.C. 608c(15)(A) provides that "[a]ny handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom." If dissatisfied with the Secretary's ruling on the administrative petition, the handler may seek judicial review of "such ruling" in the appropriate district court (7 U.S.C. 608c(15)(B)). The Act contains no other provisions for the review of market orders.

3. In December 1980, respondents[5] commenced this action in the United States District Court for the District of Columbia, seeking a declaration that all of the milk market orders, insofar as they apply to reconstituted milk products and milk powder used to make reconstituted milk products, are invalid, and an injunction prohibiting petitioners from "implementing" the regulations (which have been in effect since 1964) (C.A. App. 29). The plaintiffs, who included three individual consumers of fluid dairy products, sought to have the Secretary amend the milk market orders so that reconstituted milk would no longer be deemed a Class I product, regardless of its end use by a handler.[6] In their complaint, the individual con-

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[5] As used in this petition, "respondents" refers to the plaintiffs in the district court and does not include the intervenor-defendants who are respondents in this Court by virtue of Rule 19.6 of the Rules of this Court.

[6] Prior to filing suit, respondents had petitioned the Secretary to hold a rulemaking hearing on the same proposal (see 44 Fed. Reg. 65990 (1979)). The Secretary published a Notice of Request for Hearing and asked for comments (*ibid.*).

sumers alleged that "[t]he existing regulations have denied them the opportunity to purchase a lower price reconstituted milk product in lieu of raw fluid milk" (C.A. App. 21).[7] Joseph Oberweis, a handler regulated by one of the market orders, and the Community Nutrition Institute, a self-described "nonprofit charitable organization" (*id.* at 20-21), joined the individual consumers as plaintiffs.

Ruling on cross-motions for summary judgment, the district court dismissed the complaint for lack of jurisdiction (App. G, *infra*, 53a-67a). Citing *Rasmussen* v. *Hardin*, 461 F.2d 595, 599 (9th Cir.), cert. denied, 409 U.S. 933 (1972), and *Suntex Dairy* v. *Bergland*, 591 F.2d 1063, 1067 n.3 (5th Cir. 1979), the district court concluded that Congress intended to

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Subsequently, the Secretary published a preliminary impact analysis of respondents' proposal and invited comments (45 Fed. Reg. 75956 (1980)). Respondents filed this action shortly thereafter. Later, on April 7, 1981, the Secretary determined not to hold a rulemaking hearing because respondents' proposal would not further the purposes of the Act and could harm the dairy industry (C.A. App. 170). As a result of this action by the Secretary, the court of appeals held that that portion of respondents' complaint challenging the Secretary's "inaction" on their rulemaking request (*id.* at 20) had become moot (App. A, *infra*, 32a n.93). In its present posture, the case is limited to respondents' right to challenge the market orders on their merits.

[7] The complaint described the individual consumers as follows (C.A. App. 21):

> Plaintiffs Harrell, Desmarais and Weinberg are consumers of fluid dairy products. Due to inflation, they have become extremely cost-conscious and routinely seek to decrease food expenditures without sacrificing taste or the nutritional value of their diet. The existing regulations have denied them the opportunity to purchase a lower priced reconstituted milk product in lieu of raw fluid milk. If such lower priced milk were available they would purchase it.

preclude ultimate consumers from seeking judicial review of milk market orders (App. G, *infra*, 65a-66a). The district court also held that the consumers lacked standing because, even if the regulations were changed, too many other variables could affect the prices paid by consumers for reconstituted milk; thus, the court concluded that "any benefit to the [consumer] plaintiffs from the proposed changes in the regulations is [too] hypothetical and speculative" to confer standing (*id.* at 61a). In addition, the district court concluded that the interest asserted by the consumers—lower prices for one type of fluid milk—was outside the zone of interests protected by the AMAA. The relevant provisions of the statute, the court noted, were intended to protect consumers only against rapid or excessive price increases and against prices above the parity level (*id.* at 62a-64a). Because those interests were not implicated in this case, the court held that the statute did not confer standing on these consumers (*id.* at 64a). Finally, the district court dismissed the milk handler because he had failed to exhaust his administrative remedies under 7 U.S.C. 608c(15) (App. G, *infra*, 66a-67a).

4. A divided panel of the court of appeals affirmed in part and reversed in part, and remanded the case for a decision on the merits. The court of appeals agreed with the district court's dismissal of the milk handler and the nutrition organization (App. A, *infra*, 27a-33a). The majority held, however, that the district court had erred in dismissing the complaint of the individual consumers (*id.* at 12a-26a).

With respect to preclusion of review, the court of appeals declined to follow *Rasmussen* v. *Hardin*, *supra*, concluding that the Ninth Circuit's analysis of the statutory structure of the AMAA and its purposes did not reveal "the type of clear and convincing evidence of congressional intent needed to overcome

the presumption in favor of judicial review" (App. A, *infra*, 27a n.75). As for standing, the court concluded that the individual consumers had satisfactorily alleged injury in fact by claiming that the regulations deprive them of a lower priced alternative to whole milk and that the absence of manufacturer reconstituted milk results in seasonal shortages in the milk supply (*id.* at 14a). The majority repeatedly questioned whether the consumers' allegations of injury and redressability were capable of proof, but it concluded that they were sufficient to require a trial on the merits (*id.* at 14a, 16a, 17a-19a).

The court of appeals also held that the concerns of the individual consumers in this case were within the zone of interests protected by the AMAA. The majority rejected the district court's reliance on the AMAA's legislative history to determine the zone of interests arguably protected by the statute, concluding that plaintiffs are "only required to assert an interest 'which is *arguable from the face of the statute*' " (App. A, *infra*, 22a (emphasis in original), quoting *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 142 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978)), and that the individual consumers "have clearly done this much" (App. A, *infra*, 22a). Thus, the majority not only chastised the district court for "examining the legislative history in great detail" (*id.* at 23a), but in fact declined to examine it at all. Finally, while noting that the individual consumers' asserted injury "is shared by many other persons, *i.e.*, every other cost-conscious consumer of milk" (*id.* at 25a), the majority ruled that the consumers' claim was not barred as a generalized grievance (*id.* at 25a-26a).

Judge Scalia dissented in part. Judge Scalia concluded that the individual consumers lacked standing, and thus he would have affirmed the judgment of the

district court in its entirety (App. A, *infra*, 35a-44a). In his view, the consumers' interests fall outside the zone of interests arguably protected by the AMAA. Judge Scalia placed considerable weight on the fact that the individual consumers are "indirect general beneficiaries" of the AMAA (*id.* at 38a) and observed that "where there is a direct and immediate beneficiary class which can be relied upon to challenge agency disregard of the law, the claim of the indirect general beneficiaries to be congressionally designated 'private attorneys general' is weak indeed" (*ibid.*). As applied to this case, Judge Scalia thus reasoned that (*id.* at 38a-39a):

> The direct beneficiaries of milk marketing orders under the Agricultural Marketing Agreement Act (AMAA) are milk producers. * * * On the other side of the ledger, the direct beneficiaries of any limitations upon the Secretary's authority with regard to milk marketing orders are the milk handlers who pay the artificially established prices. * * * In such a situation, where the narrow class immediately affected by both agency excess and agency omission is readily identifiable, I do not believe that a more remote beneficiary class as generalized as the one here (*viz*, all consumers of fluid milk products—which cannot exclude many of the nation's households) can be found to meet the zone of interests test.

The government and the intervenor-appellees petitioned for rehearing en banc. The petitions were denied over the dissenting votes of Judges MacKinnon, Bork, and Scalia (Apps. D and F, *infra*, 48a-49a, 51a-52a).

REASONS FOR GRANTING THE PETITION

The decision below, in direct conflict with the Ninth Circuit's decision in *Rasmussen* v. *Hardin*, 461

F.2d 595, cert. denied, 409 U.S. 933 (1972), and with the views expressed by the Fifth Circuit in *Suntex Dairy* v. *Bergland*, 591 F.2d 1063 (1979), is the first in the nearly 50-year history of the market order system to hold that ultimate consumers of regulated agricultural commodities have standing and are proper parties to contest market orders. The case thus presents important questions concerning the orderly administration and review of commodity market orders issued by the Secretary of Agriculture under the AMAA. The significance of these questions is heightened by the vast scope of the regulatory program at issue, the complexity of which this Court has often recognized. See, *e.g.*, *Zuber* v. *Allen*, 396 U.S. 168, 172 (1969); *United States* v. *Ruzicka*, 329 U.S. 287, 292 (1946). The Department of Agriculture advises us that the value of milk handled under the various regional market orders exceeds an average of $1 billion each month. Moreover, it would seem that the court of appeals' ruling would logically extend to market orders covering other agricultural products, and approximately $6 billion worth of fruits, vegetables and specialty crops were handled under those market orders in 1982. The regulation of these commodities is so complex that some orders require adjustments to be made as often as once a week during the marketing season.

The court of appeals' decision appears to sanction challenges to all of these orders by every milk, fruit and vegetable consumer in the country. A primary purpose of the statutory program is to promote market stability, but judicial intervention at the behest of consumers who are strangers to the producer-handler relationship could result in constant uncertainty about the validity of the orders. Such uncertainty is likely to "engender those subtle forces of

doubt and distrust which so readily dislocate delicate economic arrangements." *United States* v. *Ruzicka*, *supra*, 329 U.S. at 293.

If the decision below is allowed to stand, highly technical and complex market orders will be subject to direct attack in the courts without first being reviewed in the administrative proceedings contemplated by Congress. Consumers acting as "stalking horses" for handlers, or even handlers suing in their capacity as alleged consumers, will be able to by-pass completely the Act's exclusive procedures for administrative and judicial review. Thus, in granting ultimate consumers standing to launch direct attacks in the courts against agricultural market orders, the court of appeals improperly ignored this Court's teachings that the intent of Congress to preclude review, if fairly perceived from the overall statutory scheme adopted by Congress for regulating the particular industry in issue, must be respected.

Closely related to the question of preclusion of review is the court of appeals' erroneous conclusion that the individual consumers adequately demonstrated their standing to maintain this action. Of course, if the Court agrees with our submission that Congress intended to preclude *all* consumers from seeking judicial review of market orders, it need not reach the issue of respondents' standing. But, at minimum, examination of the structure and legislative history of the AMAA clearly indicates that Congress did not intend to protect the interests asserted by the individual consumers in *this* litigation; on the contrary, their interest in lower prices for reconstituted fluid milk is inconsistent with Congress' primary purpose in enacting the statute, while their interest in ensuring stable supplies of fluid milk products simply is not implicated by the regulations at issue in this case. Accord-

ingly, review by this Court is warranted to resolve the conflict among the circuits on the question of preclusion of review and to correct the court of appeals' manifest error with respect to consumer standing.

1. a. The decision below squarely conflicts with the Ninth Circuit's decision in *Rasmussen* v. *Hardin*. In that case, the Ninth Circuit held that consumers of a filled milk product were barred from seeking review of the milk market order provisions that effectively raised the price of the product in the same manner that the market order provisions at issue in this case effectively raise the price of manufacturer reconstituted fluid milk. The court held that "clear and convincing evidence" of an intent to preclude review by consumers could be "inferred from [the statutory] purpose." *Rasmussen* v. *Hardin*, *supra*, 461 F.2d at 599, quoting *Barlow* v. *Collins*, 397 U.S. 159, 166-167 (1970). The court went on to explain (461 F.2d at 599) that:

> [It cannot] be said that Congress overlooked consumers, and that therefore it did not intend to exclude them from obtaining administrative and judicial review of the Secretary's orders. The Act contains some pious platitudes about the interests of consumers. * * * The primary purpose of the Act, however, is to protect the purchasing power of the farmers and the value of agricultural assets. * * * The whole scheme of the Act is to raise the prices of agricultural products to, and keep them at, levels fixed by the Secretary, and to establish "orderly" marketing of them. Bluntly stated, that means, in part, marketing freed to a very large extent from price competition. It is arguable that the immediate, and possibly the long-run, interests of consumers are contrary to these goals. * * * [I]t is very clear that the whole structure of the Act con-

templates a cooperative venture between the Secretary, the producers, and handlers. Nowhere in the Act can we find an express provision for participation by consumers in any proceeding. We are convinced that this is no accident.

The Fifth Circuit has suggested that it would reach the same result if confronted with a case squarely presenting the issue. In *Suntex Dairy* v. *Bergland*, *supra*, 591 F.2d at 1067 n.3, the court upheld *producers'* standing to challenge a milk market order but distinguished *consumer* interests:

> We find the generalized interests of consumers in a marketing order totally different from the interests of producers. The statute goes to great lengths to guard the interests of producers by providing for administrative hearings and a ratification referendum. No such Congressional deference was shown consumers.

In *Rasmussen*, the Ninth Circuit also noted that consumer suits would be particularly anomalous because the statute contains no requirement for consumers to exhaust administrative remedies, whereas handlers, who are given an express right of judicial review, must first exhaust administrative remedies. Consumer suits would thus mean that handlers could evade the exhaustion requirement by latching on to consumer "front-men." See *Rasmussen* v. *Hardin*, *supra*, 461 F.2d at 600. This case vividly demonstrates the potential for such abuse of the legislative scheme. Respondent Oberweis was dismissed for failure to exhaust his administrative remedies as a handler (App. A, *infra*, 31a-33a; App. G, *infra*, 66a-67a). Yet as a result of the majority's decision to allow the individual consumers to maintain this action, Oberweis will still have his claims adjudicated without first invoking the administrative process. Indeed, it would not

be at all surprising if Oberweis were a "cost-conscious consumer," as well as a milk handler, and the decision below would appear to allow for amendment of the complaint to add Oberweis in his new-found capacity as a consumer plaintiff.

This Court has expressly disapproved of analogous efforts to frustrate carefully constructed congressional schemes for orderly administrative and judicial review. See, *e.g.*, *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375-376 (1979) ("If a violation of Title VII could be asserted through § 1985(3), * * * the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII"); *Brown* v. *General Services Administration*, 425 U.S. 820, 832-833 (1976) ("The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. * * * Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible.").

Similarly, authorizing consumer litigants to challenge market orders issued under the AMAA offers the potential for considerable mischief. Congress had sound reasons for concluding that attacks on market orders should be considered by the Secretary in the first instance. The questions raised in such attacks are often complex, and their resolution requires an intimate knowledge of the economic and technical factors underlying the marketing of the various agricultural products subject to regulation—*e.g.*, milk, nuts, fruits, vegetables, and hops (7 U.S.C. 608c(2)). It is thus

desirable that, before judicial intervention is sought, these questions be presented to the Secretary, who possesses the requisite expertise to illuminate and resolve them. See, *e.g.*, *Blair* v. *Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966) ("A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing.").

This Court recognized the importance of these considerations in *United States* v. *Ruzicka*, *supra*. In rejecting an effort by a handler to attack for the first time the validity of an order of the Secretary of Agriculture as a defense to a judicial enforcement proceeding brought by the Secretary, the Court stressed the purposes of the statutory review provisions (329 U.S. at 294):

> Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of his rulings, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts.[8]

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[8] Respondents' petition for a rulemaking hearing (see pages 7-8 note 6, *supra*) is no substitute for the administrative procedures mandated by the statute and available only to handlers. As the court of appeals noted (App. A, *infra*, 32a-33a; emphasis in original), the complaint in this case "challenge[s] the Secretary's authority to *adopt* the compensatory payment regulation *in the first place*; [the] complaint did *not* attack his subsequent refusal to correct that alleged wrong." Thus, the issues raised in the lawsuit were *not* decided by the Secre-

Ruzicka articulated another important reason for requiring handlers to exhaust the statutorily-prescribed administrative remedies when it stressed the disruptive potential of premature litigation (329 U.S. at 293):

> Failure by handlers to meet their obligations promptly would threaten the whole [regulatory] scheme. * * * To make the vitality of the whole arrangement depend on the contingencies and inevitable delays of litigation, no matter how alertly pursued, is not a result to be attributed to Congress unless support for it is much more manifest than we here find. That Congress avoided such hazards for its policy is persuasively indicated by the procedure it devised for the careful administrative and judicial consideration of a handler's grievance.

Consumer suits would effectively nullify Congress' intent, recognized by this Court in *Ruzicka* (329 U.S. at 293-294 & n.3), to "establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." S. Rep. No. 1011, *supra*, at 14. Consumer litigants could seek injunctions against the operation of market orders that Congress intended to remain in effect pending the completion of full administrative and judicial proceedings brought by handlers. Such a result cannot be squared with *Ruzicka*, or with the limitations on judicial review at the behest of handlers contained in 7 U.S.C. 608c(15)(B).

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tary's denial of the petition for a rulemaking hearing. Moreover, as explained by Judge Scalia (*id.* at 41a-44a), the administrative proceeding required by 7 U.S.C. 608c(15)(A) as a prerequisite to judicial review is an entirely different type of proceeding from the informal rulemaking hearing that respondents sought.

b. The court of appeals clearly erred in its disregard for the statutory scheme and in its insistence (App. A, *infra*, 27a n.75) on express statutory language foreclosing actions by ultimate consumers. This Court has already held that preclusion of review may be implied as well as expressed. "A clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose." *Barlow* v. *Collins*, *supra*, 397 U.S. at 166-167; accord, *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977). Moreover, the stringent standards normally required to demonstrate congressional intent to preclude review are less appropriate when the issue is not whether judicial review is entirely foreclosed but instead whether review at the behest of the particular plaintiff is precluded. See, *e.g.*, *United States* v. *Ruzicka*, *supra*, 329 U.S. at 293-294; see also *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, No. 81-334 (Feb. 22, 1983), slip op. 23; *Morris* v. *Gressette*, *supra*, 432 U.S. at 505-507 & n.21; *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 746 (1977); *Barlow* v. *Collins*, *supra*, 397 U.S. at 175 n.9 (Brennan, J., concurring and dissenting); *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 300 (1943).

It is thus extremely significant in this case that the Act does grant handlers an express right to judicial review. Handlers serve as spokespersons for interests shared with the general public,[9] and granting an exclusive right of review to handlers strikes the

[9] That consumer interests are truly deprivative of handler interests—consumers complain that they pay more because handlers pay more—is shown by the fact that handlers and consumers asserted identical claims both in the instant case and in *Rasmussen* v. *Hardin*, *supra*. See App. A, *infra*, 39a-40a (Scalia, J., dissenting).

necessary balance between the need for stability in the functioning of the progam and the importance of providing a forum for the redress of grievances. See page 18, *supra*. Adding consumers to the category of persons entitled to sue, when, as the Ninth Circuit found, Congress did not overlook consumers but instead necessarily intended to exclude them (*Rasmussen* v. *Hardin*, *supra*, 461 F.2d at 599), quite clearly upsets this balance. Under these circumstances, the majority erred in requiring more explicit evidence of congressional intent to preclude review.

c. Although the court of appeals relied (App. A, *infra*, 27a n.75) on this Court's decision in *Stark* v. *Wickard*, 321 U.S. 288 (1944), that case is plainly distinguishable. There milk producers challenged certain deductions that were made from the so-called "producers settlement fund" established in connection with a milk market order. In granting standing to the producers, even though Congress failed to give them an administrative remedy or the right to judicial review, the Court pointed out that they had a proprietary interest in the fund, and that it "is because every dollar of reduction comes from the producer that he may challenge the use of the fund" (321 U.S. at 308). The Court also noted that the statute gives producers "definite personal rights," rights that are "not possessed by the people generally" (*id.* at 304, 309). Clearly, the proprietary interest asserted in *Stark* could not be adequately represented by some other party. By contrast, as already noted (see page 19 note 9, *supra*), and as Judge Scalia pointed out in dissent (App. A, *infra*, 38a-40a), the consumer interests in this case are merely derivative of, and protected by, the more specific interests of handlers.[10]

[10] It is also worth noting that the disruptive potential arising out of a producer suit such as that authorized in *Stark*

2. Assuming arguendo that Congress did not preclude *all* consumer suits under the AMAA, nevertheless the court of appeals erred in concluding that the consumer respondents in this case have standing to maintain their challenge to the market order provisions at issue. The various elements of the standing doctrine were thoroughly set forth in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). There the Court held that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)." *Valley Forge, supra*, 454 U.S. at 472 (footnote omitted). In addition, the Court has adhered to a number of prudential considerations bearing on the question of standing. Thus, "the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Id.* at 475, quoting *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975). And "the Court has required that the

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is far less than the disruption likely to be caused by consumer suits of the type sanctioned by the decision below. Milk market orders only become and remain effective with the agreement of a majority of the producers (see page 6, *supra*), and thus producer suits challenging such orders will be relatively infrequent. Consumers, on the other hand, could conceivably assert an "interest" in challenging every market order because, by legislative design, they would have played no formal role in devising the orders.

plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge, supra*, 454 U.S. at 475, quoting *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). The consumer respondents failed to satisfy a number of these requirements.

Respondents alleged two injuries in their complaint. First, they claimed that the market orders deprive them of a nutritious, low-cost substitute for regular fluid milk. Second, they claimed that, by making reconstituted fluid milk uneconomical for handlers to produce, the orders deprive consumers of a "stabilizing market influence" that could operate to offset seasonal fluctuations in the supply of regular fluid milk.[11] Respondents' first asserted injury lies outside the zone of interests arguably protected by the AMAA, while the second asserted injury fails to satisfy the constitutional requirement of injury in fact. Moreover, the complaint as a whole fails to satisfy the Article III requirement of redressability and the pru-

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[11] Specifically, respondents described their alleged injuries as follows (C.A. App. 25-26):

> 28. The economic barriers to marketing reconstituted milk created by the existing Orders deprive plaintiffs Weinberg, Harrel, and Desmarais and other consumers of access to a nutritious dairy beverage at a lower price than fresh drinking milk.
>
> * * * * *
>
> 31. The existing Orders deprive producers and consumers of a stabilizing market influence. A reconstituted fluid product could quickly expand the fluid milk supply when seasonable changes result in a reduction of the whole fluid milk supply. Tight fluid markets and rising fluid prices could be avoided and the size of the reserve fresh whole Grade A milk needed to provide the fluid market could be reduced if such adjustments were possible.

dential prohibition against the litigation of generalized grievances.

a. Respondents' allegation that the market order provisions at issue deprive them of a low-cost substitute for regular fluid milk fails to satisfy the zone of interests requirement. The primary purpose of the AMAA is to protect dairy farmers;[12] the express purpose of the market order provision (7 U.S.C. 608c) is "to *raise* producer prices." S. Rep. No. 1011, *supra*, at 3 (emphasis added). Thus, as the Ninth Circuit noted in *Rasmussen* v. *Hardin*, *supra*, 461 F.2d at 599, consumers' interests in lower prices not only are not within the scope of Congress' concern, but are actually contrary to the legislative design.

The court below totally disregarded Congress' purpose in enacting the AMAA when it held that consumers' interests in lower prices for reconstituted fluid milk fall within the Act's zone of interests. The court of appeals' error was twofold—first, it relied on isolated statutory references to consumers that, when analyzed, do not support the court's conclusion, and, second, it eschewed any resort to the legislative history to elucidate the statute's meaning.

The court of appeals' conclusion on the zone of interests issue rested on policy sections of the AMAA that merely reference consumers. For example, 7 U.S.C. 602(2) provides that it is the policy of Congress:

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[12] Confirmation of Congress' solicitude for farmers is apparent from the Act's requirement that at least two-thirds of the dairy farmers in an affected region must approve a proposed market order before it may take effect (7 U.S.C. 608c(8)). This requirement operates even in the face of opposition from affected handlers if "such order is the only practical means of advancing the interests of the producers" (7 U.S.C. 608c(9)(B)). Moreover, if producers become dissatisfied with an order they, unlike handlers, may require the Secretary to terminate it (7 U.S.C. 608c(16)(B)).

> [t]o protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

It is difficult to understand how this section's reference to consumers supports the result reached by the court of appeals. In the quoted section, Congress acted to protect the interest of consumers only to the extent that that interest was consistent with the pricing policy for farmers established in 7 U.S.C. 602(1). That section's declared policy is to establish parity prices for farmers. As the court of appeals itself noted, 7 U.S.C. 602(2) "expresses Congress' intent to protect consumers against *unwarrantably rapid or excessive* price increases by limiting the Secretary's authority to fix prices at parity and no higher" (App. A, *infra*, 20a; emphasis added; footnote omitted). Clearly, that legislative intent to ensure price *stability* has nothing to do with consumers' asserted interest in *lowering* prices for reconstituted fluid milk.[13]

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[13] The Department of Agriculture advises us that throughout the entire history of the AMAA, the blend prices paid to producers under the market orders have rarely, if ever, reached parity. For at least the last several years, the blend prices paid under all orders have been below parity. Thus, even the limited protection that Congress may have intended for consumers is not implicated by the realities of the regulatory program.

The court of appeals also relied on 7 U.S.C. 602 (4), which expresses a policy of protecting producers and consumers against "unreasonable fluctuations in supplies and prices." See App. A, *infra*, 22a-23a. Again, this section does not support the interest in *lower* prices asserted by the consumer respondents. Moreover, the consumers have never alleged that the challenged market order provisions subject them to unreasonable *fluctuations* in prices. Equally important, as pointed out by the district court, Section 602(4) was enacted in 1954 as an amendment to the AMAA, in response to totally different problems from those addressed by Congress in 1937 (App. G, *infra*, 62a-63a; emphasis added):

> The 1954 amendments were enacted to counter the falling farm prices caused by the surplus of commodities after the Korean Conflict. H.R. Rep. No. 1927, 83rd Cong., 2d Sess., *reprinted in* [1954] U.S. Code Cong. & Ad. News 3399, 3401. The amendments dealt primarily with price supports and parity pricing. *Id.* at 3399-3400. * * *
>
> Nowhere in the House Report is the interest of consumers mentioned in relation to Orders regulating commodities. Indeed, the Orders are not even a significant part of the 1954 Act. *The comments on consumers in the legislative history seem primarily aimed at dispelling the misconception that the flexible price-support program embodied in the bill would materially lower consumer prices. See* House Report, *supra*, at 3404.

Therefore, the statute's mere mention of consumers is insufficient to bring the consumer respondents in this case within the zone of interests to be protected by the AMAA. Careful analysis of the statutory purposes, erroneously eschewed by the court of appeals, reveals that lower prices for consumer products was simply not an interest that Congress acted to protect.

Finally, the court of appeals clearly erred in disregarding the statute's legislative history (App. A, *infra,* 21a-23a). As this Court has recognized, " 'there certainly can be no "rule of law" which forbids [reference to legislative history], however clear the words may appear on "superficial examination." ' " *Train* v. *Colorado Public Interest Research Group, Inc.,* 426 U.S. 1, 10 (1976), quoting *United States* v. *American Trucking Associations, Inc.,* 310 U.S. 534, 543-544 (1940). Here, "superficial examination" of the statute does indeed show that "consumers" are mentioned in the Act; but closer analysis of the structure of the statute and examination of the legislative history demonstrate that the interests asserted by the consumers in *this* litigation were never within the contemplation of Congress. The court of appeals' contrary conclusion, based only on the fact that the statutory text mentions "consumers," should be corrected.

b. The court of appeals also erred in concluding that the consumer respondents satisfactorily established their standing to maintain this suit through their allegation that the market order provisions at issue "deprive producers and consumers of a stabilizing market influence" (C.A. App. 26). Ensuring stable market conditions *is* an express purpose of the statute (see 7 U.S.C. 602(4)), and thus respondents' asserted injury is arguably within the Act's zone of interests.[14] The problem here, however,

[14] The legislative history indicates, however, that, as with prices, Congress' intention to promote market stability was meant to protect *farmers* rather than consumers. See H.R. Rep. No. 1241, 74th Cong., 1st Sess. 10 (1935) (emphasis added) ("In order to eliminate, so far as possible, violent seasonal fluctuations in the available milk supply *with their attendant disturbing effect upon returns to producers,* and to encourage a uniform volume of production throughout the

is that respondents essentially did no more than parrot the language of the statute. Even then, their allegation of injury was entirely speculative and hypothetical; they asserted that "[a] reconstituted fluid product *could* quickly expand the fluid milk supply * * *" (C.A. App. 26; emphasis added). Plainly, this is insufficient to demonstrate the constitutionally-required injury in fact. Respondents did not allege that *they* (or, for that matter, any other consumers) have ever been or are likely to be subjected to seasonal shortages in milk supply. This is a fatal defect. See *Warth* v. *Seldin*, *supra*, 422 U.S. at 498-499, 504.

Moreover, any allegation that the consumer respondents have in fact suffered or are likely to suffer from seasonal shortages would be untenable. There are indeed seasonal fluctuations in the production of milk, but a number of regulatory mechanisms operate to prevent those fluctuations from affecting ultimate consumers.[16] Under these circumstances, respondents

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year, an adjustment in payments to producers" may be made.). See also *Suntex Dairy* v. *Bergland*, *supra*, 591 F.2d at 1064-1065 (emphasis added) ("The blend price mechanism established by a milk marketing order acts as a stabilizing influence that insulates *farmers* from the buffeting of prices that would otherwise accompany differences in consumer demand.").

[16] Many market orders establish a "base" system for allocating payments from handlers to producers. See 7 U.S.C. 608c(5)(B); H.R. Rep. No. 1241, 74th Cong., 1st Sess. 9-10 (1935). Adjustments to the base system may authorize higher payments for milk produced during seasonal low periods and thus provide incentives to counteract fluctuating production levels. *Id.* at 10. Second, the price paid to rural producers may include a premium to provide them with an incentive to ship their milk to city markets whenever necessary. *Id.* at 9-10. Third, the price support system, an entirely separate system regulating milk production (see 7 U.S.C. 1421-1449),

were required to come forward with facts supporting their claimed injury. They utterly failed to do so with respect to their market stabilization claim, and that claim must therefore be disregarded. See *Warth* v. *Seldin*, *supra*, 422 U.S. at 501-502.

c. While recognizing that the interests asserted by the consumer respondents in this case are widely shared (App. A, *infra*, 25a), the court of appeals concluded that dismissal of the suit on "generalized grievance" grounds would mean that consumer suits would never be justiciable (*ibid.*). In the context of this case, the court was clearly wrong. As stressed by Judge Scalia in dissent (*id.* at 38a-40a), consumer interests in milk market orders are entirely derivative of handlers' interests and can be fully protected by handlers' suits (brought after proper exhaustion of administrative remedies). Moreover, Congress, when it chooses, can and does overcome prudential limitations on standing such as the generalized grievance doctrine by extending standing to any person adversely affected or aggrieved by the challenged action. See, *e.g.*, *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979). As we have already demonstrated, however, Congress has not chosen to do so in the AMAA. On the contrary, granting stand-

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keeps the supply of milk high year round because it ensures a market for dairy products even in the months when flush production outstrips consumer demand. In fact, since the fall of 1979, there has been a dramatic increase in milk production without a concomitant increase in demand. See *South Carolina* v. *Block*, Nos. 83-1426 and 83-1511 (4th Cir. Sept. 9, 1983), slip op. 6; 48 Fed. Reg. 34943 (1983). During fiscal year 1982, the government purchased nearly $845 million in surplus milk products under the price support system. As a result of these various factors, there is no experience within general knowledge or subject to judicial notice of a shortage of milk at the consumer level.

ing to consumers whose interests are indirect and shared in common with nearly every household in the nation undermines the statutory scheme enacted by Congress and threatens to disrupt a massive program that has stability as a primary goal. See, *e.g.*, 7 U.S.C. 601. Such a dramatic change in a regulatory program of nearly 50 years' duration is "most appropriately addressed in the representative branches." *Valley Forge*, *supra*, 454 U.S. at 475.

d. Finally, respondents failed to show that the interests they seek to advance are redressable by a favorable judicial decision in this action. Congress has recognized that retail prices paid by consumers are largely independent of the wholesale prices paid to farmers. H.R. Rep. No. 1927, 83d Cong., 2d Sess. 7, 9 (1954). Thus, it is entirely speculative and beyond the control of the Secretary whether changes in the market orders would bring about the lower retail prices that the consumer respondents seek. As the district court explained (App. G, *infra*, 61a):

> There are too many variables which would have an effect on consumer prices if the Market Orders were changed. These variables include: whether handlers pass the cost savings on to consumers; whether the change causes a substantial market dislocation, leading to higher overall milk prices; whether increased demand for milk powder will increase its price; whether handlers would dry milk merely to evade the regulations. This situation is, as the Preliminary Impact Statement, 45 Fed. Reg. 75,956 (1980), indicates, extremely complex, and any benefit to the plaintiffs from the proposed changes in the regulations is hypothetical and speculative.

The court of appeals disagreed with these observations based solely on the Department of Agriculture's preliminary impact analysis, 45 Fed. Reg. 75956

(1980), which the court read as showing that the immediate (*i.e.*, within three years) impact of adopting respondents' proposal would be to save consumers nationwide $186 million annually (App. A, *infra*, 17a). But the court misunderstood the impact analysis. In fact, the analysis offers no evidence regarding the likely behavior of the many nonregulated parties intervening between producers and ultimate consumers, whose actions necessarily determine the redressability of respondents' grievance. Rather, for purposes of studying respondents' proposal, the impact analysis assumed that all factors would operate to consumers' benefit because it was impossible to measure those factors (see 45 Fed. Reg. 75960, 75963 (1980)). Thus, the assumption that a change in the market orders would benefit consumers remains entirely speculative and cannot satisfy the Article III requirement of redressability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 81-2191

COMMUNITY NUTRITION INSTITUTE,
ET AL, APPELLANTS,

v.

JOHN R. BLOCK, Secretary, United States
Department of Agriculture, ET AL.

Argued 4 Oct. 1982

Decided 21 Jan. 1983

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 80-03077)

Before TAMM, WILKEY and SCALIA, Circuit Judges.

Opinion for the Court filed by Circuit Judge WILKEY.

Opinion concurring in part and dissenting in part filed by Circuit Judge SCALIA.

WILKEY, Circuit Judge:

Appellants, three individual consumers of milk, a non-profit consumer organization and a handler of milk products, have joined forces to challenge the manner in which reconstituted milk is regulated under forty-seven milk market orders adopted pursuant to the Agricultural Marketing Agreement Act (AMAA).[1] The district court dismissed their com-

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[1] 7 U.S.C. §§ 601-624 (1976 & Supp. V 1981).

plaint, holding that the individual consumers and the organization lacked standing and that the handler failed to exhaust his administrative remedies. We reverse the district court's decision with respect to the individual consumers and remand the case for a decision on the merits.

I. BACKGROUND

A. *The Regulatory Scheme*

The Secretary of Agriculture (the Secretary) has regulated the milk industry through the use of milk market orders since 1937.[2] These orders, issued pursuant to section 608c of the AMAA,[3] regulate the price milk producers[4] receive for their dairy products. The orders are effective on a regional basis and cover most, but not all, of the United States.[5] Under the orders, dairy products are divided into separate classes, based on the use to which the raw milk is ultimately put. Raw milk which is processed and bottled for fluid consumption is Class I milk.[6] Raw milk which is used to produce manufactured milk

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[2] The conditions leading to the enactment of the AMAA have been chronicled in previous judicial decisions. *See, e.g., Zuber* v. *Allen*, 396 U.S. 168, 172-76, 90 S.Ct. 314, 317-19, 24 L.Ed.2d 345 (1969); *Shepps Dairy, Inc.* v. *Bergland*, 628 F.2d 11, 13-15 (D.C. Cir. 1979).

[3] 7 U.S.C. § 608c (1976 & Supp. V 1981).

[4] A producer is "any person who produces milk in compliance with the inspection requirements of a duly constituted health authority, which milk is received at a pool plant or diverted . . . from a pool plant to a non-pool plant." 7 C.F.R. § 1012.12 (1982) (Tampa Bay Marketing Order).

[5] 7 C.F.R. §§ 1001-1139 (1982).

[6] *See, e.g., Id.*, § 1012.40(a).

products such as butter, cheese, or dry milk powder is classified as Class II milk.[7]

Class I milk must be consumed rather quickly after it is produced because it is a fertile field for bacteria. It is therefore sold mostly on a regional basis. Class II milk products, on the other hand, can be stored for a longer period of time and therefore compete directly with similar products from across the nation. As a result of this increased competition, Class II milk commands a lower price on the market than fluid milk.

In order to provide dairy farmers with the stability needed to prevent a recurrence of the ruinous competition that devastated the milk industry during the depression,[8] section 608c authorizes the Secretary to issue milk market orders ensuring that producers receive uniform prices for their raw milk irrespective of the use to which it is put.[9] Thus, under current milk market orders "handlers" [10] (who buy the milk from the producers) pay a minimum price for Class I milk and a lower minimum price for Class II milk. The handlers make all payments into a regional pool, and producers are then paid out of the pool on the

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[7] *See, e.g., Id.*, § 1012.40(b). Under many orders milk is divided into three classes. However, for purposes of this case, all milk other than milk used for fluid purposes will be referred to as Class II milk.

[8] *See* note 2 *supra*.

[9] 7 U.S.C. § 608c(5)(B)(ii) (1976).

[10] Handlers are "processors, associations of producers, and others engaged in the handling of any agricultural commodity or product." 7 U.S.C. § 608c(1) (1976).

basis of the average price received for milk in all uses.[11]

Reconstituted milk products are fluid products manufactured by combining water with whole milk powder or nonfat powder.[12] Reconstituted milk was not regulated under the milk market orders for nearly thirty years, but in 1964 the Secretary issued the regulations which are the subject of this dispute.[13] Under these regulations, a handler who purchases milk powder from outside the order area and manufactures it into a reconstituted milk product pays the Class II price and reports the purchase to the order area administrator.[14] The reconstituted milk product is then regulated as though it were fresh milk coming into the area from an unregulated area (an area not subject to a milk market order).[15] It is assumed that the handler will use the reconstituted milk to manufacture Class II products,[16] but if the handler's records show that he has not manufactured enough Class II products to account for all the reconstituted milk, he is required to make a compensatory payment

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[11] This average price is referred to as the "uniform price" or "blend price." The method for computing this price is set out in 7 C.F.R. § 1012.61 (1982).

[12] Butterfat or nondairy fats such as coconut oil may also be added. The milk is then considered to be "filled" milk.

[13] 28 Fed. Reg. 11,848 (1963); 28 Fed. Reg. 11,956, 12,000 (1963); 29 Fed. Reg. 9,002, 9,110, 9,214 (1964). In 1969 the regulations were expanded to cover "filled" milk. 34 Fed. Reg. 16,548 (1969).

[14] 7 C.F.R. § 1012.30(a) (b) (1982).

[15] *Id.*, § 1012.14(c).

[16] *See, e.g., Id.*, § 1012.44(a) (5) (i).

on the remainder.[17] The compensatory payment is equal to the difference between the Class I and Class II prices and is put into the regional pool for distribution, not to the seller of the milk powder, but to the local producers of fresh milk.[18] It is undisputed that the compensatory payment requirement raises the handler's cost of producing reconstituted fluid milk and it is this aspect of the various milk market orders which appellants challenge.

B. *The Present Litigation*

On 23 August 1977 appellants petitioned the Secretary of Agriculture to eliminate the compensatory payment requirement from the various milk market orders. Nineteen months later, having failed to receive a response to their petition, appellants filed the present action in federal district court, claiming that the regulation requiring compensatory payments exceeded the Secretary's authority under the AMAA and violated the provision of the AMAA prohibiting economic trade barriers on milk and milk products, and that his refusal to act on their petition was arbitrary and capricious. Appellants asked the court to invalidate, and enjoin the enforcement of, the compensatory payment provisions of the various milk market orders.

On 7 April 1981, four months after this suit was filed, the Secretary denied appellant's petition. This decision was made after "a careful and thorough review of the issues," based on public comments and "a

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[17] *Id.*, § 1012.60(e).

[18] *Id.*, § 1012.71(a)(1).

comprehensive preliminary economic impact statement" developed by the agency.[19]

On 29 September 1981 the district court granted appellees'[20] motion to dismiss appellants' complaint. The court first held that the individual consumers and the Community Nutrition Institute (CNI) lacked standing, concluding that they had not shown the requisite injury in fact, that their interests were not within the zone of interests arguably protected by the relevant statute, and that, in any event, Congress intended to preclude consumers from challenging milk market orders in court. The court dismissed the milk handler as well, noting that although he had standing (since the AMAA specifically authorizes judicial review for handlers),[21] he could not be allowed to prosecute the present litigation because he had not complied with the procedural requirements outlined in the statute, thereby failing to exhaust his administrative remedies. This appeal followed.

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[19] Letter from William T. Manley, Deputy Administrator, Marketing Program Operations, to Community Nutrition Institute, 7 April 1981 (USDA Decision Letter) at 1, *reprinted in* Joint Appendix (JA) at 170.

[20] Appellees include the Secretary of Agriculture and the United States Department of Agriculture (the Secretary) and the National Milk Producers Federation, Associated Milk Producers, Inc., and Central Milk Producers Cooperative (Producers).

[21] 7 U.S.C. § 608c(15) (1976).

II. Standing

A. *General Principles*

In the last decade the Supreme Court has addressed the issue of standing in a variety of contexts.[22] This increased activity has not resulted in a complete clarification of the law;[23] nevertheless, some discernable guidelines have been laid down. It will be helpful to examine these guidelines before applying them to the specific facts of the case at hand.

It is clear that "[t]he term 'standing' subsumes a blend of constitutional requirements and prudential considerations."[24] It is now also clear that there are at least three elements a plaintiff must establish in

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[22] *E.g., Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *United States* v. *SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973).

[23] *See, e.g.*, Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 Rutgers L.Rev. 863 (1977); Davis, *Standing 1976*, 72 Nw.L. Rev. 69 (1977); Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv.L.Rev. 1281, 1304-05 (1976).

[24] *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. at 471, 102 S.Ct. at 758.

order to satisfy the constitutionally imposed standing requirements.

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show [1] that he personally has suffered some actual and threatened injury as a result of the putatively illegal conduct of the defendant," . . . and [2] that the injury "fairly can be traced to the challenged action" and [3] "is likely to be redressed by a favorable decision." [25]

Establishing the first element (injury in fact) requires the plaintiff to allege facts demonstrating a definable and discernable injury and an adequate connection between that injury and himself. The requirements of the second and third elements, however, have not always been as clear. Some confusion has arisen because the Supreme Court has used language which seems to indicate that the "fairly traceable causation" requirement and the "redressability" requirement are interchangeable.[26] However, the Court's articulation of the Art. III standing limits in

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[25] *Id.* at 472, 102 S.Ct. at 758 (quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979) and *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976)). *See also Consumers Union* v. *Federal Trade Commision*, 691 F.2d 575, 577 n. 9 (D.C.Cir. 1982) (en banc).

[26] For example, in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), the Court stated: "The more difficult step in the standing inquiry is establishing that these injuries 'fairly can be traced to the challenged action of the defendant,' . . . *or put otherwise*, that the exercise of the Court's remedial powers would redress the claimed injuries." *Id.* at 74, 98 S.Ct. at 2631 (quoting *Eastern Kentucky*, 426 U.S. at 41, 96 S.Ct. at

Valley Forge recognizes that the two considerations are not necessarily the same.[27] The fairly-traceable causation inquiry is directed toward the connection between the injury and the *defendant's actions.* The redressability inquiry, on the other hand, focuses on the connection between the injury and the *action requested of the court.* The fairly traceable causation requirement is therefore generally based on past or present occurrences (the effect of the defendant's actions), while the redressability requirement is based on future probabilities (the effect of the court's decision). Of course, there is a correlation between the two elements. As the connection between the alleged injury and the defendant's actions becomes more direct, the likelihood that requiring the defendant to change his behavior will redress that injury increases. However, it is important to keep the two inquiries separate, lest the confusion continue.[28]

Therefore, in order to satisfy the Art. III requirements of standing a plaintiff must show three things:

1925) (emphasis added). Similarly, in *Warth* v. *Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), the Court observed that Art. III required a plaintiff to establish that "the asserted injury was the consequence of the defendant's actions [fairly traceable causation], *or* that prospective relief will remove the harm [redressability]." *Id.* at 505, 95 S.Ct. at 2208 (emphasis added).

[27] The Court stated that Art. III requires a plaintiff to show that he has suffered a personal injury and that the injury " 'fairly can be traced to the challenged action, *and* 'is likely to be redressed by a favorable decision.' " *Valley Forge,* 454 U.S. at 472, 102 S.Ct. at 758 (quoting *Eastern Kentucky Welfare Rights,* 426 U.S. at 38, 41, 96 S.Ct. at 1924, 1925) (emphasis added).

[28] A good example of the difference between the "fairly traceable causation" and the "redressability" requirements can be found in the facts involved in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 98 S.Ct. 2620,

(1) that he has suffered an actual or threatened injury (an adequate connection between a definable and discernable injury and the plaintiff); (2) that the injury fairly can be traced to the challenged action (an adequate connection between the alleged injury and the defendant's actions); and (3) that the injury is likely to be redressed by a favorable decision (an adequate connection between the alleged injury and the action requested of the court).

Once a plaintiff has met the constitutionally imposed requirements of standing he may still be prevented from prosecuting his suit if prudential considerations[29] dictate that the court stay its hand. Of

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57 L.Ed.2d 595 (1978). In *Duke Power* plaintiffs challenged the Price-Anderson Act, which established a limit on the liability of nuclear power plant operators. The alleged injuries consisted of the adverse environmental and aesthetic consequences of the thermal pollution caused by Duke Power's nuclear power plants. Thus, in order to determine whether the injury could fairly be traced to the federal government, the Court was required to determine whether the existence of the Price-Anderson Act was a cause of the decision to *construct* the nuclear power plant (which was in turn the more immediate cause of the alleged injuries). However, assuming the power plant was substantially completed or already operational, the court would have to determine whether invalidating the Act would cause the plant to *shut down* in order to determine redressability. This is an entirely different consideration because once a company has expended funds to construct a plant, the absence of a liability limitation may not be as important. *See* Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint,* 69 Ky.L.J. 185, 199-201 (1980).

[29] In a prior opinion this court explained the meaning of the term prudential consideration.

> We believe that the fact that the [non-constitutional] limitations of the standing doctrine . . . are termed "pru-

particular concern to this litigation are the requirement that the plaintiff's complaint be "arguably within the zone of interests to be protected or regulated by the statute . . . in question,"[30] and the reluctance of federal courts to adjudicate " 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches."[31] These prudential considerations also focus on the connection between the alleged injury

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> dential limitations" does not mean that the lower courts have discretion as to whether to apply these limitations or not. The Supreme Court has announced these prudential limitations in its supervisory capacity over the federal judiciary and, in the context of cases such as the one now before us, we believe *there is a nondiscretionary duty* to apply the limitations. This duty to apply the standards does not detract from the discretion involved in determing whether the standard has been satisfied.

Tax Analysts & Advocates v. *Blumenthal*, 566 F.2d 130, 137 n. 37 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978) (emphasis added).

[30] *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). *See also Valley Forge*, 454 U.S. at 475, 102 S.Ct. at 760; *Gladstone, Realtors*, 441 U.S. at 100 n. 6, 99 S.Ct. at 1608 n. 6; *Eastern Kentucky Welfare Rights*, 426 U.S. at 39 n. 19, 96 S.Ct. at 1924 n. 19.

[31] *Valley Forge*, 454 U.S. at 475, 102 S.Ct. at 760 (quoting *Warth* v. *Seldin*, 422 U.S. at 499-500, 95 S.Ct. at 2205-06). The Supreme Court has observed that another prudential consideration is embodied in the general rule that a " 'plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' " *Id.* 454 U.S. at 474, 102 S.Ct. at 759-60 (quoting *Warth* v. *Seldin*, 422 U.S. at 499, 95 S.Ct. at 2205). That consideration is not a concern in this litigation.

and various aspects of the suit. The zone of interests requirement focuses on the connection between the alleged injury and the relevant statute, while the generalized grievance limit seems [32] to require an inquiry into the connection between the alleged injury and the public in general.

Thus, in order to withstand the present motion to dismiss for lack of standing, appellants must allege a definable and discernible injury and then establish the proper connection between that injury and themselves, the Secretary's actions, the requested relief, the relevant statute, and the public in general. We hold that the individual consumers have met this burden, while CNI has not.

B. *Individual Consumer Standing*

Deborah Harrell, Ralph Desmarais, and Zy Weinberg (Consumers) are, according to their allegations, consumers of fluid dairy products who seek to decrease their food expenditures without sacrificing taste or the nutritional value of their diet.[33] The district court dismissed them from the present litigation, holding that they had failed to establish either the constitutional or prudential elements of standing. Applying the analysis outlined above, we must reverse.

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[32] The exact nature of the generalized grievance restriction is far from clear. *See* note 74 *infra.*

[33] Plaintiffs' Complaint for Declaratory Action and Injunctive Relief (Plaintiffs' Complaint) at ¶ 7, *reprinted in* JA at 20.

1. *Art. III Considerations*

a. *Injury in fact* (connection between definable and discernable injury and the plaintiff)

In order to establish the required injury, a plaintiff need not allege facts establishing a substantial injury, "an identifiable trifle will suffice." [34] However, the injury must be definable and discernable and, in order to establish the proper connection to the plaintiff, it must be specific.[35] Consumers have alleged just such an injury.

Consumers allege that the existing reconstituted milk regulations injure them in two ways. First, they claim they are precluded from purchasing "a nutritious dairy beverage at a lower price than fresh drinking milk." [36] Second, they allege that they are deprived "of a stabilizing market influence," since "[a] reconstituted fluid product could quickly expand the fluid milk supply when [seasonal] changes result in a reduction of the whole fluid milk supply." [37] Appellees maintain that these injuries fail to meet the constitutional standard of concreteness. They argue that since milk powder is available to Consumers at retail markets, Consumers could buy the powder and reconstitute the milk themselves at less than the price of whole milk. Thus, appellees contend, the injury asserted by Consumers is merely an objection to the taste of reconstituted milk from products presently

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[34] *Public Citizen* v. *Lockheed Aircraft Corp.*, 565 F.2d 708, 714 (D.C.Cir. 1977) (citing *United States* v. *SCRAP*, 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 2417 n. 14, 37 L.Ed.2d 254 (1973)).

[35] *Id.* at 715.

[36] Plaintiffs' Complaint at ¶ 28, *reprinted in* JA at 25-26.

[37] *Id.* at ¶ 31, JA at 26.

marketed at retail. This, they claim, is not a definable and discernible injury. However, even assuming appellees are correct in asserting that undesirable taste is an insufficient injury,[28] their argument is still unpersuasive.

In determining whether a plaintiff has alleged a definable and discernable injury, the focus is on the plaintiff's *allegations*, *not* on the availability of alternative remedies. Consumers allege that they are being deprived of a lower priced alternative to whole milk. If these allegations are true, as we must assume, Consumers have been injured economically, even if they could ameliorate this injury by purchasing some alternative product. Further, if as Consumers allege, the absence of manufacturer reconstituted milk results in seasonal shortages in the milk supply, they have sustained a further injury. At the trial Consumers may be unable to prove that they have actually sustained these injuries, but their allegations meet the constitutional requirement of injury in fact.[29]

b. *Causation* (connection between the alleged injury and the defendant's actions)

In order to establish the second constitutional element of standing, a plaintiff must show that the in-

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[28] Although we do not decide the issue, such an injury *may* be sufficient since " '[*a*]*esthetic* and environmental well-being, . . . are important ingredients in the quality of life in our society.' " *Duke Power*, 438 U.S. at 74 n. 18, 98 S.Ct. at 2631 n. 18 (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 734, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972)) (emphasis added).

[29] There is no dispute over the adequacy of the connection between the alleged injury and Consumers. Nor could there be since Consumers allege that *they* have been deprived of a lower cost milk alternative and of the stabilizing influence that product would bring to the dairy market.

jury " 'fairly can be traced to the challenged action.' "[40] Although this requirement has not been applied consistently in all cases,[41] it is met if the plaintiff alleges a *fairly* traceable connection between the defendant's action and the alleged injury. A plaintiff need only make a reasonable showing that "but for" defendant's action the alleged injury would not have occurred.[42] Consumers have sufficiently established this connection.

Consumers allege that when the compensatory payment is added to the other costs incurred by a handler in producing reconstituted milk, the resulting price makes reconstituted milk products uncompetitive with fresh milk.[43] They claim that "but for" the regulation, handlers would be able to market reconstituted milk for less than fresh milk and that, as a result, reconstituted milk would be available at a lower retail price than whole milk. Appellees dispute the factual basis of Consumers' allegations. According to appellees, the market structure of the dairy industry is so complex that it is impossible to determine whether lower handler costs would have been passed on to Consumers. Thus, appellees argue, it cannot be said with any certainty that the challenged regulation is the cause of Consumers' injury. Again, however, appellees' argument misses the mark.

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[40] *Valley Forge*, 454 U.S. at 472, 102 S.Ct. at 758 (quoting *Eastern Kentucky Welfare Rights*, 426 U.S. at 41, 96 S.Ct. at 1925).

[41] *See Nichol, supra* note 28 at 196; Note, *The Generalized Grievance Restriction: Prudential Restraint or Constitutional Mandate?*, 70 GEO.L.J. 1157, 1158 n. 7 (1982).

[42] *Duke Power*, 438 U.S. at 74-75, 98 S.Ct. at 2630-31.

[43] Plaintiffs' Complaint at ¶ 26, JA at 25.

It may well be that the structure of the dairy market is so complex that a reduction in handler costs does not inevitably result in lower consumer prices. Nonetheless, Consumers are not required to *prove* that lower prices will result, they are only required to *assert* a *fairly* traceable causal connection between the challenged action and the alleged injury. Consumers' contention that if handlers were not required to make a compensatory payment they would pass the savings on to the consumer is a reasonable one. Nothing more is required. If standing depended on a plaintiff's ability to allege uncontrovertible facts, there would be very few plaintiffs who could establish standing in a lawsuit of any complexity. Having alleged a reasonable connection between the challenged regulations and their alleged injuries, Consumers are entitled to a trial on the merits to determine what the facts really are.[44]

c. *Redressability* (connection between the alleged injury and the action requested of the court)

The third element of the Art. III limit on standing is met when a plaintiff establishes that his alleged injury " 'is likely to be redressed by a favorable deci-

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[44] Had Consumers' allegations been insufficient to establish the requisite causal link, the defect would have been corrected by Consumers' proffered evidence that in those areas not covered by federal milk market orders reconstituted milk had been and was being manufactured and sold to consumers for less than the price of fresh milk, JA at 66, and by affidavits of milk handlers indicating that the regulations raised the price of reconstituted milk so as to make it uneconomical to produce. *CNI* v. *Block,* No. 80-3077, *slip op.* at 6 (D.D.C. 29 Sept. 1981).

sion.' "[45] The degree of likelihood required is not completely clear.[46] However, because the relevant inquiry is directed to the effect of a future act (the court's grant of the requested relief) it would be unreasonable to require the plaintiff to *prove* that granting the requested relief is *certain* to alleviate his injury. Furthermore, as cases such as the present one show, litigation often "present[s] complex interrelationships between private and government activity that make difficult absolute proof that the harm will be removed."[47] Thus, a court should be careful not to require too much from a plaintiff attempting to show redressability, lest it abdicate its responsibility of granting relief to those injured by illegal governmental action.

Consumers argue that they have established the required likelihood of redress by producing a United States Department of Agriculture Impact Statement which predicts that if the compensatory payment requirement were eliminated, consumers nationwide would save $186 million annually within three years,[48] and by offering evidence that handlers in non-regulated areas have manufactured and marketed lower-priced reconstituted milk.[49] The district court found this

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[45] *Valley Forge*, 454 U.S. at 472, 102 S.Ct. at 758 (quoting *Eastern Kentucky Welfare Rights*, 426 U.S. at 38, 96 S.Ct. at 1924). *See also Gladstone, Realtors*, 441 U.S. at 180, 99 S.Ct. at 1608; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 262, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977).

[46] *See* Nichol, *supra* note 28, at 201-13.

[47] *Id.* at 215.

[48] 45 Fed. Reg. 75,956, 75,971 (1980), *reprinted in* JA at 77.

[49] *Id.* at 75,960, JA at 66.

showing inadequate because the same USDA statement relied upon by Consumers estimated that elimination of the compensatory payment requirement would cost milk *producers* $576 million. The court observed that this drop in producer earnings "*might* interfere with the public's access to an adequate supply of milk and *might* result in higher prices for milk products."[60] The court concluded that since the structure of the dairy industry is so complex, "any benefit to the plaintiffs from the proposed changes in the regulations is hypothetical and speculative."[61] We conclude that the district court required too much of Consumers.

Admittedly, it is hard to predict the effect of removing the compensatory payment requirement, but Consumers produced evidence indicating that the *immediate* result of removing the contested regulation will be increased savings for all consumers. The possibility that the change would also harm producers is relevant to the standing issue only in that such a harm *might* cause market disruptions which *might ultimately* harm Consumers. Whether the potential long term deleterious effects of the requested change outweigh the potential immediate benefits is a question the court will have to resolve in order to determine the validity of the regulation. However, Consumers should not be required to prove that the potentially harmful effects will not occur in order to establish standing. As the Supreme Court has observed, a plaintiff is not required to negate every "speculative and hypothetical possibilit[y] . . . in order to demonstrate the likely effectiveness of judicial relief."[62] Re-

[60] *CNI*, *slip op.* at 7 (emphasis added).

[61] *Id.*

[62] *Duke Power*, 438 U.S. at 78, 98 S.Ct. at 2633.

quiring Consumers to show more than they did in this case forces them to prove their case in order to acquire standing. This is not what the Constitution requires. The redressability element of Art. III is designed to bar disputes which will not be resolved by judicial action. It does not prevent a court from hearing a case which may ultimately be unsuccessful.

2. *Prudential Considerations*

As noted above,[63] there are valid nonconstitutional requirements which a plaintiff may be required to meet in order to establish standing. The district court found that one of these, the zone of interests requirement, had not been met by Consumers. On appeal, appellees point to another nonconstitutional standing requirement which they claim Consumers have not satisfied—the requirement that the alleged injury be more than a generalized grievance. We hold that Consumers have satisfied both of these requirements.

a. *Zone of Interests* (connection between the alleged injury and the relevant statute)

The Supreme Court has stated that a plaintiff may be dismissed for lack of standing if his alleged injury is not "arguably within the zone of interests protected or regulated by the statute . . . in question."[64] Whether Consumers' alleged injuries are arguably within the zone of interests protected by the relevant statute in this case depends on which statutes are relevant.

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[63] *See* text at notes 29-32 *supra*.

[64] *Association of Data Processing Service*, 396 U.S. at 153, 90 S.Ct. at 829.

Consumers point to two portions of the AMAA policy section which indicate an intent to protect consumers from the type of injuries they have allegedly incurred. Section 602(2) expresses Congress' intent to protect consumers against unwarrantably rapid or excessive price increases by limiting the Secretary's authority to fix prices at parity and no higher.[55] Section 602(4) expresses the policy of protecting consumers from "unreasonable fluctuations in supplies and prices."[56] The district court, relying on this court's opinion in *Tax Analysts and Advocates* v.

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[55] In full section 602(2) provides:

It is declared to be the policy of Congress—

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

7 U.S.C. § 602(2) (1976).

[56] 7 U.S.C. § 602(4) (1976). The entire section provides:

It is declared to be the policy of Congress—

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

Blumenthal,[67] held that these sections were not relevant to the present suit, pointing out that the challenged regulations were issued pursuant to section 608c which does not mention consumers.

In *Tax Analysts* we held that the general policy section of a statute may be read in conjunction with the challenged portion only if the two parts of the statute share "an identity of purpose." [68] The district court ruled that section 608c and sections 602(2) and (4) do not share this identity of purpose. The court noted that section 608c was enacted as part of the original AMAA in the 1930's and that it dealt solely with milk market orders.[69] Section 602(4), on the other hand, was added to the AMAA in 1954. Relying extensively on legislative history,[60] the court concluded that the 1954 amendment was designed to counter the falling farm prices caused by the surplus of commodities after the Korean War and that the expressed intent to protect consumers was limited to situations involving price supports and parity pricing. Thus, in the district court's view, section 602(4) was not a "relevant statute" since it was enacted at a different time, in response to a different problem than section 608c. The court also found section 602(2) irrelevant since it dealt with parity pricing and not milk market orders. However, the district court's ap-

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[67] 586 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978).

[68] *Id.* at 141.

[69] Section 608c gives the Secretary authority to issue market orders for a variety of agricultural commodities, but milk is the only one with which this litigation is concerned.

[60] H.R. REP. NO. 1927, 83rd Cong., 2d Sess., *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 3399.

proach in analyzing the identity of purpose issue, although undeniably thorough in its own right, was not consistent with the reasoning we utilized in *Tax Analysts.* As a result, the district court failed to reach the correct result.

In *Tax Analysts* we stressed the "generous nature" of the zone of interests test.[61] In particular we noted that a plaintiff was only required to assert an interest "which is *arguable from the face of the statute.*"[62] Consumers have clearly done this much. Although section 608c deals exclusively with the Secretary's authority to issue market orders, it is not immunized from the effect of the general policy sections. Section 608c(4) requires the Secretary to find that an order "will tend to effectuate the declared policy of this chapter" before he issues that order.[63] The declared policies of the AMAA are contained in section 602. Section 602(4) clearly expresses the policy that the Secretary use "the powers conferred . . . under this chapter . . . as will provide in the interests of producers *and consumers*, an orderly supply [of milk] . . . *to avoid unreasonable fluctuations in supplies and prices.*"[64] Since Consumers allege that the challenged

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[61] 566 F.2d at 142.

[62] *Id.* (emphasis added).

[63] 7 U.S.C. § 608c(4) (1976).

[64] 7 U.S.C. § 602(4) (1976) (emphasis added).

The dissent argues that the references to consumer interests are mere "pious platitudes" which have "no real bearing" on the issue of standing. Dissent at [40a, *infra*]. The references to consumers may be pious, but Congress expressly directed the Secretary to take those "platitudes" into account when issuing a milk market order, 7 U.S.C. § 608c(4) (1976), and to terminate any order that does not effectuate them. *Id.* § 608c (16)(A).

portion of the milk market orders prohibits the sale of reconstituted milk, resulting in higher milk prices and seasonal shortages, they have asserted an interest which is at least "arguably" within the zone of protected interests.[68] The district court's efforts to distinguish the two sections by examining the legislative history in great detail is simply inconsistent with the purposes behind the zone of interests test.[69]

b. *Generalized Grievance*

The Supreme Court has noted that even when a plaintiff meets the Art. III standing requirements, a federal court may refrain from adjudicating issues which "amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the

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[68] In almost any regulatory scheme some interests will be more directly affected than others. However, contrary to the dissent's argument, this does not require us to dismiss those whose interests may be less directly affected. As this court has observed, "the challenging party need only show that it is an intended beneficiary of the statute not necessarily the primary one." *Constructores Civiles de Centroamerica, S.A.* v. *Hannah*, 459 F.2d 1183, 1189 (D.C. Cir. 1972).

[69] As we noted in *Tax Analysts*:

> [A] full-scale examination of legislative history presents the distinct possibility that the generous nature of the zone test, which results from the language of the test itself, will be undermined. Such an approach may lead to a requirement that there be affirmative evidence that the Congress intended that a plaintiff situated precisely as the plaintiff then standing before the court be regulated or protected. Any tendency to move in this direction would detract from the flexibility of the zone standard provided by the requirement that the plaintiffs' interest be only "arguably" within the zone.

566 F.2d at 142.

representative branches."[67] Appellees argue that Consumers' injury falls into this category since it is an injury suffered in "some indefinite way in common with people generally."[68] However, a review of the cases relied on by appellees[69] and an examination of the argument they advance[70] make it apparent that they confuse this prudential consideration with the constitutional requirement of injury in fact.[71] As

[67] *Valley Forge*, 454 U.S. at 475, 102 S.Ct. at 760 (quoting *Warth* v. *Seldin*, 422 U.S. at 499-500, 95 S.Ct. at 2205-06).

[68] *Frothingham* v. *Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923).

[69] *E.g., O'Shea* v. *Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974) ("Abstract injury is not enough"); *Public Citizen* v. *Lockheed Aircraft Corp.*, 565 F.2d 706, 715 (D.C.Cir. 1978) (the injury "must be perceptible, concrete, specific . . . .").

[70] It is in this section of his brief that the Secretary makes the argument that Consumers' injury amounts to no more than an "objection to the taste of reconstituted milk from powder presently marketed at retail . . . ." Fed. Appellees Brief at 25. *Cf.* text at note 38, *supra*.

[71] Appellees' confusion is understandable given the Supreme Court's failure consistently to articulate whether the generalized grievance restriction is a prudential or a constitutional limit. *See* Note, *The Generalized Grievance Restriction: Prudential Restraint or Constitutional Mandate*, 70 Geo.L.J. 1157 (1982). Indeed, the Supreme Court contributed to this confusion in *Valley Forge* by clearly labeling the generalized grievance as a prudential consideration in one part of the opinion, 454 U.S. at 474-75, 102 S.Ct. at 759-60, and then later noting that the " '*case or controversy*' aspect of standing is unsatisfied 'where a taxpayer seeks to employ a federal court as a forum in which to air his *generalized grievances* about the conduct of government or the allocation of power in the Federal System.' " *Id.* at 479, 102 S.Ct. at 762 (quoting *Flast* v. *Cohen*, 392 U.S. 83, 106, 88 S.Ct. 1942, 1955, 20 L.Ed.2d 947 (1968)) (emphasis added).

we have already noted,[72] Consumers' alleged injury is sufficiently definable and discernable to meet the constitutional requirement and appellees' efforts to litigate this issue under a new title must be rejected.

Consumers' injury is a generalized grievance only in the sense that it is shared by many other persons, *i.e.*, every other cost-conscious consumer of milk. It may be argued that the widespread nature of the injury requires us to dismiss the claim as a generalized grievance. However, we refuse to believe that the mere fact that a plaintiff's injury is shared by many people requires a court to dismiss his complaint. If dismissal were required in such cases, consumer injuries would never be justiciable because "[c]onsumer injuries, by their very nature tend to be shared in common by many other similarly situated individuals." [73] Although it is not clear what the limits of the generalized grievance restriction are,[74]

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[72] *See* text at notes 34-39 *supra*.

[73] *Cutler* v. *Kennedy*, 475 F.Supp. 838, 848 n. 23 (D.D.C. 1979).

[74] It is not clear whether the restriction has ever been applied as a nonconstitutional limit. Supreme Court cases relying on the generalized grievance restriction as a ground for denying standing seem to have been decided on *constitutional* grounds. *See, e.g., Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974) ("Such a generalized interest . . . is too abstract to constitute a 'case or controversy' . . . ."); *United States* v. *Richardson*, 418 U.S. 166, 179-80, 94 S.Ct. 2940, 2947-48, 41 L.Ed.2d 678 (1974) ("to invoke judicial power the claimant must have a 'personal stake in the outcome,' . . . or a 'particular, concrete injury' . . . or 'a direct injury,' . . . in short, something more than a generalized grievance.") (citations omitted). The cases in which the generalized grievance restriction has been clearly labeled as a prudential consider-

we hold that the mere fact that the injury may be shared by many consumers does not require us to dismiss this complaint on that ground.

Finding that neither constitutional nor prudential considerations prevent Consumers from bringing the present action, we reverse the district court and hold that Consumers have standing.[75]

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ation have not used it as a ground for decision. *Warth*, 422 U.S. at 499, 95 S.Ct. at 2205; *Gladstone, Realtors*, 441 U.S. at 100, 99 S.Ct. at 1608. Therefore, the scope of the restriction as a nonconstitutional limit is not clear.

It is also unclear whether the restriction serves an independent purpose. In *Warth* the Court noted that prudential limitations like the generalized grievance restriction were required because otherwise "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." 422 U.S. at 500, 95 S.Ct. at 2306. *See also Valley Forge*, 454 U.S. at 475, 102 S.Ct. at 780. If a question is abstract, the *constitutional* limits on standing require dismissal. If on the other hand, the concern is that other governmental institutions are more competent to address the question, the political question doctrine, a prudential consideration, would appear to require dismissal. *See Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

[75] We also reject appellees' argument that Congress has impliedly precluded consumers from challenging milk market orders. Appellees rely on *Rasmussen* v. *Hardin*, 461 F.2d 595 (9th Cir.), *cert. denied*, 409 U.S. 933, 93 S.Ct. 230, 34 L.Ed.2d 188 (1972), in which the 9th Circuit held that Congress had precluded judicial review of consumer challenges to milk market orders. In *Rasmussen* the court noted that while the AMAA provides a special review procedure for handlers affected by a milk market order, it does not provide a similar procedure for consumers. The court found that this omission was deliberate because: (1) "the whole structure of the Act

C. *CNI's Organizational Standing*

Community Nutrition Institute (CNI) is a non-profit charitable organization specializing in food and nutrition issues. CNI seeks to establish standing as an organization in its own right. The district court held that CNI failed to meet the standing requirements and accordingly, dismissed the organization.

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contemplates a cooperative venture between the Secretary, the producers, and the handlers," *id.* at 599; (2) to grant standing to consumers would defeat Congress' intent that all challenges be initially considered by the agency rather than the courts, *id.* at 599-600; and (3) granting standing to consumers would encourage handlers to bypass the agency by finding a consumer who would lend his name to a suit challenging the order. *Id.* at 600.

We conclude that this does not constitute the type of clear and convincing evidence of congressional intent needed to overcome the presumption in favor of judicial review, *see, e.g., Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1977), especially since no legislative history or statutory language is cited. *See National Association of Home Health Agencies* v. *Schweiker*, 690 F.2d 932, 942 (D.C. Cir. 1982). The mere fact that review is expressly provided for handlers is not conclusive. *See Stark* v. *Wickard*, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944) (producers can challenge the administration of a milk market fund, even though there was an express judicial review provision for handlers but not for producers). Moreover, if Congress intended to channel all challenges through the agency, producers should also be required to follow that route. Yet, several courts have concluded that challenges by producers may be heard by courts without first being considered by the Secretary. *Dairylea Cooperative, Inc.* v. *Butz*, 504 F.2d 80, 83 (2d Cir. 1974); *Jones* v. *Bergland*, 456 F.Supp. 635, 641-42 (E.D.Pa. 1978). Finally, the Ninth Circuit's concern over handler-consumer collusion is an inadequate basis for inferring *congressional* intent. In the absence of some evidence that Congress at least considered the issue, we refuse to hold that Congress intended to leave consumers without a remedy.

Because we conclude that CNI has not met the constitutional requirements of standing, we affirm the district court on this issue.

1. *Injury in fact*

CNI alleges that it has suffered two injuries as a result of the allegedly illegal compensatory payment requirement: (1) the requirement obstructs CNI's institutional interest in "seeing that consumers" have nutritious fluid dairy products available at the lowest possible price;[76] and (2) it prevents CNI from fully achieving its educational objective of informing low-income individuals about sources of low-cost nutritional food.[77] Only the later allegation satisfies the injury in fact requirement.

An obstruction of an organization's interest in "seeing" that consumers have nutritious fluid products available at the lowest possible price is not the type of definable and discernible injury that permits an organization to establish standing. In *Simon* v. *Eastern Kentucky Welfare Rights Organization*[78] the Supreme Court held that an organization interested in seeing that poor people had access to health services, "could not establish . . . standing on the basis of that goal."[79] The Court, citing *Sierra Club* v. *Morton*,[80] noted that "an organization's abstract concern with a subject that could be affected by an ad-

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[76] Appellants' Brief at 23. *See also* Plaintiffs' Complaint at ¶ 5, JA at 21.

[77] *Id.*

[78] 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1978).

[79] *Id.* at 39-40, 96 S.Ct. at 1924-25.

[80] 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

judication does not substitute for the concrete injury required by Art. III."[81] In *Sierra Club* the Court held that an injury to the Sierra Club's institutional interest in seeing that the nation's natural resources were protected from man's degradation was not a sufficient basis for establishing standing.[82] CNI's interest in "seeing" that consumers have the nutrition they need at the lowest possible price is the same type of abstract interest which the Supreme Court held was insufficient in *Eastern Kentucky Welfare Rights* and *Sierra Club*.

CNI cites *CNI* v. *Bergland*[83] as support for its contention that its alleged injury is sufficient to establish standing. In *Bergland* the court held that CNI had standing as a *representative* of consumers to challenge regulations implementing the National School Lunch and Breakfast program. The court noted that CNI had standing because it was an organization "*speaking for individuals*, whose health and nutrition interests are affected by the Secretary's action."[84] In the present case CNI seeks to establish standing on the basis of its *institutional* interests. It is not acting as a spokesman for individual consumers.[85]

CNI further seeks to shore up its argument by citing *Havens Realty Corp.* v. *Coleman*.[86] In *Havens Realty* the Supreme Court held that a plaintiff orga-

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[81] 426 U.S. at 40, 96 S.Ct. at 1925 (citations omitted).

[82] 405 U.S. at 739-741, 92 S.Ct. at 1368-69.

[83] 493 F.Supp. 488 (D.D.C. 1980).

[84] *Id.* at 492 (emphasis added).

[85] CNI has not alleged that its members have been injured as a result of the challenged action. *Cf. Warth*, 422 U.S. at 511, 95 S.Ct. at 2211.

[86] 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982).

nization had institutional standing because it alleged that defendant's racial steering practices frustrated "its efforts to assist equal access to housing through counseling and other referral services." [87] CNI argues that their alleged injury is identical to that alleged by the organization in *Havens Realty*. However, the Court in *Havens Realty* noted that the defendant's actions interfered with the "organization's *activities*," distinguishing those activities from the "organization's abstract social interests." [88] In the present case CNI claims it has an interest in "seeing" that consumers receive dairy products at the lowest possible price. It does not allege that it assists them in doing this, nor does it allege that the contested regulation impedes it from assisting consumers. It seeks standing on the basis of its abstract interest in seeing that consumers achieve this goal. Such an injury is not sufficiently concrete to establish standing.

CNI's second *alleged* injury does meet the injury in fact requirement. If, as CNI alleges, it has been prevented from informing low-income individuals about sources of low-cost food, it has suffered a definable and discernible injury because it would be prevented from carrying out one of its primary activities.[89] However, this alleged injury cannot be the basis for establishing standing in this case because CNI has failed to establish *any connection* between the alleged injury and the challenged regulation.

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[87] *Id.* at 379, 102 S.Ct. at 1124.

[88] *Id.* (emphasis added).

[89] *See Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Commission*, 481 F.2d 1079, 1086 n. 28 (D.C. Cir. 1973).

2. *Causation*

CNI alleges that the challenged regulation interferes with its efforts to inform low-income individuals about the sources of low cost food. However, CNI fails to assert *any* reasonable connection between that injury and the Secretary's actions. Nothing in the challenged regulation affect CNI's ability to inform consumers about sources of low cost food. Thus, this case is distinguishable from *Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Commission*,[90] on which CNI relies. In *Scientists' Institute* this court held that an association's educational activities were impaired by the AEC's refusal to prepare an impact statement. In the present case the Secretary has made a study of the effect of removing the contested portion of the milk market orders and has made that information available to the public. The contested regulation has no impact on the availability of information which CNI seeks to disseminate. It may limit the availability of low-priced dairy products, but that is not the injury of which CNI complains. CNI has failed to establish any connection between the Secretary's action and an injury to its educational activities. Having failed to satisfy the constitutional requirements of standing, CNI is precluded from litigating the issues on the merits.

III. Exhaustion of Administrative Remedies

Appellant Joseph Oberweis is a handler of milk products. It is undisputed that he has standing to bring the present suit.[91] Nevertheless, the district court dismissed Oberweis, holding that he failed to

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[90] 481 F.2d 1079 (D.C. Cir. 1973).

[91] *See* 7 U.S.C. § 608c(15)(A) (1976).

exhaust his administrative remedies. Oberweis admits that he has not meticulously followed the statutory procedures for filing a "handler petition" under section 608c(15)(A),[92] but he argues that he should not be required to file another petition because he has substantially complied with the requirements of that section. We must reject that argument, however, because of the context in which the present action arose.

The present action is *not* an appeal from the Secretary's decision denying the petition filed by Oberweis and the other appellants in 1979. The complaint in this action was filed 2 December 1980, four months *before* the Secretary acted on the 1979 petition. In the complaint appellants asked the court, *inter alia*, to hold that the Secretary's *refusal to act* on the petition was arbitrary and capricious,[93] but they did not

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[92] *Id.*

In full the section provides:

> Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

Section 608c(15)(B) vests federal district courts with jurisdiction to review the Secretary's ruling on a section 15(A) petition. *Id.*, § 608c(15)(B).

[93] Since the Secretary ultimately acted on the petition, appellants' complaint concerning his refusal to act is now moot.

seek review of the decision itself. Appellants challenge the Secretary's authority to *adopt* the compensatory payment regulation *in the first place*; their complaint did *not* attack his subsequent refusal to correct that alleged wrong. Thus, Oberweis' argument that he substantially complied with section 15(A) by joining the other appellants in filing a petition in 1979 is misguided since he is not seeking a review of the Secretary's decision with respect to that petition. If Oberweis wants a court to decide whether his 1979 petition substantially complies with the exhaustion requirements of section 15(A) he will have to challenge the Secretary's decision on *that* petition. We express no opinion on the validity of Oberweis' argument in that respect because the present case does not involve that petition.

Since Oberweis is not appealing from a ruling in which he first petitioned the Secretary for relief, we hold that he has not exhausted his administrative remedies as required by the statute.[94]

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[94] Unlike Oberweis, Consumers are not required to follow the procedures outlined in section 15(A) because they are not covered by that section, which deals with handlers only. Nor is there any basis for inferring that Consumers should be subject to the same requirements. Section 15(A) was designed to prevent a handler (who is the only party subject to liability for violating a milk market order) from needlessly interrupting enforcement proceedings initiated by the Secretary agai t the handler. *See United States* v. *Ruzicka*, 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290 (1946). The exhaustion requirement of section 15(A) thus establishes "an equitable and expeditious procedure for testing the validity of orders, *without hampering the Government's power to enforce compliance* with their terms." H.Rep. No. 1241, 74 Cong., 1st Sess. 14 (1935) (emphasis added). Since a suit by a group of consumers will not directly interfere with any pending enforce-

IV. Conclusion

The individual consumers in this case established a definable and discernible injury and the proper connection between that injury and the various aspects of the suit. The district court's insistence that they prove more than they did was improper. A plaintiff is not required to prove his case in order to acquire standing. The district court did, however, correctly conclude that CNI failed to satisfy the constitutional elements of standing. An organization cannot establish standing on the basis of its abstract interest in seeing that justice prevails. The district court was also correct in its decision to dismiss Oberweis.[96] Accordingly, the district court's opinion is affirmed in part and reversed in part, and the case is remanded to the district court for a decision on the merits.

It is so ordered.

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ment proceedings, there is no reason to stretch section 15(A) beyond its express limits. *Cf. Dairylea Cooperative, Inc.* v. *Butz*, 504 F.2d 80, 83 (2d Cir. 1974) (producer allowed to challenge milk market order without first petitioning the Secretary for relief); *Jones* v. *Bergland*, 456 F.Supp. 635, 641-42 (E.D.Pa. 1978) (producer not required to exhaust administrative remedies because he had no remedies to exhaust).

[96] Because this action is not an appeal from a ruling under 7 U.S.C. § 608c(15)(A), the district court's jurisdiction will exist under 28 U.S.C. § 1331, rather than 7 U.S.C. § 608c(15)(B). Nevertheless, the district court's scope of review is still somewhat limited. The compensatory payment regulation should be sustained if it is within the Secretary's granted power, issued pursuant to proper procedure, and supported by adequate evidence and reason *when adopted*. *Dairylea Cooperative, Inc.* v. *Butz*, 504 F.2d 80, 84 (2d Cir. 1974). *See generally* K. Davis Administrative Law Treatise § 5.03, at 299 (1958).

SCALIA, Circuit Judge, concurring in part and dissenting in part:

I join Part II C of the Court's opinion, which affirms dismissal of Community Nutrition Institute for lack of standing. I concur in the result of Part III, affirming the dismissal of Oberweis, but would rest dismissal upon the ground assigned by the district court: the failure to exhaust administrative remedies. I dissent from the Court's action in reversing the district court's dismissal of the individual consumers, who in my view were correctly found to lack standing.

THE INDIVIDUAL CONSUMERS

This suit challenging federal agency action invokes the "generous review provisions" [1] of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1976), which have "greatly expanded the availability of judicial review," [2] conferring standing where preexisting "prudential limitations" would exclude it.[3] The zone of interest test was originally formulated to describe the application of these statutory provisions.[4] Although it has subsequently been used in non-APA cases, to describe one of the prudential

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[1] *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51, 75 S.Ct. 591, 594, 99 L.Ed. 868 (1955).

[2] *Heikkila* v. *Barber*, 345 U.S. 229, 232, 73 S.Ct. 603, 604, 97 L.Ed. 972 (1953).

[3] *See Sierra Club* v. *Morton*, 405 U.S. 727, 733, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972).

[4] *See id.* (citing *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), and *Barlow* v. *Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970)).

limitations upon standing in general,[5] its application in that context is not likely the same. The Supreme Court's most recent recitation of the "arguably within the zone of interests" formula in a non-APA case omits the word "arguably." [6]

In a suit such as this, however, seeking review of action by a federal agency, the original formulation in all its liberality applies. When interpreting its meaning, one must bear in mind that the test represents not an independent judicial prescription, but a judicial attempt to ascertain legislative intent. It is supposed to indicate when Congress intended to make a particular litigant "a proper party to request an adjudication of a particular issue." [7] In the context of suits challenging agency action it is meant to determine whether Congress intended the plaintiff to serve as a "private attorney general," [8] "to bring to the attention of the appellate court errors of law" by the Executive branch.[9]

The test becomes a progressively weaker indication of such intent as the breadth of the zone of interests within which the plaintiff claims his interests lies is

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[5] *See, e.g., Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n. 6, 99 S.Ct. 1601, 1608 n. 6, 60 L.Ed.2d 66 (1979); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 320-21 n. 3, 97 S.Ct. 599, 602-03 n. 3, 50 L.Ed.2d 514 (1977).

[6] *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475, 102 S.Ct. 752, 760, 70 L.Ed.2d 700 (1982).

[7] *Sierra Club* v. *Morton*, *supra* note 3, 405 U.S. at 732 n. 3, 92 S.Ct. at 1364 n. 3 (quoting *Flast* v. *Cohen*, 392 U.S. 83, 100, 88 S.Ct. 1942, 1952, 30 L.Ed.2d 947 (1968)).

[8] *Association of Data Processing Service Organizations* v. *Camp*, *supra* note 4, 396 U.S. at 154, 90 S.Ct. at 830.

[9] *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 477, 60 S.Ct. 693, 698, 84 L.Ed. 869 (1940).

increased. Thus, in *Data Processing, supra* note 4, it was eminently reasonable to conclude that Congress intended a proscription against the Comptroller General's allowance of competition to be enforceable in the courts by one of the injured competitors. It would be less reasonable, however, to conclude that a legislative directive to the Comptroller General to audit all banking institutions displays a congressional intent to permit suit by all bank depositors. The reason for the difference is the same as the reason underlying the "generalized grievance" thread of judicially imposed limitations upon standing[10]: Governmental mischief whose effects are widely distributed is more readily remedied through the political process, and does not call into play the distinctive function of the courts as guardians against oppression of the few by the many. Thus, for such matters it is less likely that Congress intended the creation of private attorneys general to supplement, through the courts, the President's primary responsibility to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3.

Even so, where the statute in question seeks to protect nothing but generalized interests, a "hospitable" interpretation of the APA may justify placing that entire class within its expanded prescription of standing. That was the case, for example, with the National Environmental Policy Act, which was directed not to the protection of any narrow group or class, but to the preservation of the environment for the benefit of the entire country. The Supreme Court found that anyone who used the natural resources as-

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[10] *See, e.g., Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 217-20, 94 S.Ct. 2925, 2930-31, 41 L.Ed.2d 706 (1974); *United States* v. *Richardson*, 418 U.S. 166, 176-80, 94 S.Ct. 2940, 2946-48, 41 L.Ed.2d 678 (1974); *Ex parte Levitt*, 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937).

sertedly affected by disregard of the Act had standing to sue.[11] It is quite another matter, however, when a statutory provision benefits generalized interests *through the protection of more particularized interests to which it is immediately directed.* Almost any statute has generalized indirect benefits; ultimate improvement of the society at large is the whole theoretical justification for heeding the requests of "special interests." But where there is a direct and immediate beneficiary class which can be relied upon to challenge agency disregard of the law, the claim of the indirect general beneficiaries to be congressionally designated "private attorneys general" is weak indeed. In such circumstances the whole premise of the liberalized standing provisions no longer applies:

> The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized.[12]

The consumer plaintiffs in the present case are indirect general beneficiaries. The direct beneficiaries of milk marketing orders under the Agricultural Marketing Agreement Act (AMAA) are milk producers. Even before adoption of the APA, the courts found a congressional intent to permit them to sue.[13]

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[11] *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).

[12] *Barlow* v. *Collins, supra* note 4, 397 U.S. at 167, 90 S.Ct. at 838.

[13] *Stark* v. *Wickard*, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944).

On the other side of the ledger, the direct beneficiaries of any limitations upon the Secretary's authority with regard to milk marketing orders are the milk handlers who pay the artificially established prices. Congress expressly gave them standing to obtain judicial review in the AMAA itself. 7 U.S.C. § 608c(15)(B) (1976). In such a situation, where the narrow class immediately affected by both agency excess and agency omission is readily identifiable, I do not believe that a more remote beneficiary class as generalized as the one here (*viz*, all consumers of fluid milk products—which cannot exclude many of the nation's households) can be found to meet the zone of interests test.

Consumer interests with regard to milk marketing orders can be consequential to *either* milk handlers' interests (as in the present case) *or* producers' interests. The latter would be the situation if not high prices (or, what ultimately amounts to the same, the unavailability of a ready substitute to augment fluid milk supplies at the retail level) but rather inadequacy of production were the gravamen of the complaint. In my view, consumers would have standing in neither situation, but their case is particularly weak in the former, where the primary vindicator of the generalized interest in question is specifically designated by judicial review provisions of the statute itself. It is true enough, as *Stark* v. *Wickard*, *supra* note 13, amply demonstrates,[14] that explicit provision for review by one class of interests does not necessarily imply an absence of intent to provide review to other interests whose grievance is quite distinct. But where, as in the present case, the second

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[14] *See* the dissent of Frankfurter, J., 321 U.S. at 317, 64 S.Ct. at 574.

grievance is entirely derivative of the first—where consumers complain that they will have to pay more *because* milk handlers will have to pay more—then the statutory review provision does suggest that the more remote group was not meant to have standing to sue.

My conclusion is unaffected by the allusions to consumer interests in the general purpose section of the act, 7 U.S.C. § 602(2), (4) (1976). With regard to an interest so generalized, they seem to me to represent, if not (as the Ninth Circuit said in a case contradicting the majority's holding here) "pious platitudes," [15] then at least no more than a recital of the ultimate purpose of the statutory scheme which has no real bearing upon who was expecetd to enforce it.

APPELLANT OBERWEIS

I concur in affirming the district court's dismissal of the milk handler's suit. I would base the affirmance, however, upon the ground used by the district court: failure to exhaust administrative remedies.

Before us and the district court, Oberweis makes the same claim as the other appellants, that the milk marketing order was invalid. He does not seek to appeal denial of the 1979 petition for rulemaking, in which he joined the other appellants in alleging, among other things, invalidity of the order; but he asserts that the filing and denial of that petition satisfied the requirement that he exhaust his § 608c (15)(A) remedies—a requirement that does not apply to the other appellants. If I understand the majority opinion correctly, its dismissal of Oberweis's complaint is based upon the proposition that when

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[15] *Rasmussen* v. *Hardin*, 461 F.2d 595, 599 (9th Cir.), *cert. denied*, 409 U.S. 933, 93 S.Ct. 230, 34 L.Ed.2d 188 (1972).

a requirement of exhaustion of administrative remedies exists, appeal must be taken from the agency denial that constitutes the exhaustion, and the grievance cannot be brought to court in any other fashion. That may be correct, but I have some doubt, since it seems a most rigid application of a doctrine that is generally quite flexible—so that, for example, exhaustion is excused entirely when it would obviously be unavailing.[16] I prefer, therefore, to rest my disposition of this aspect of the case upon what seems to me surer ground: that Oberweis's petition could not in any event comply with the exhaustion requirement.

As the majority opinion notes, Oberweis is forced to admit that he "has not meticulously followed the statutory procedures for filing a 'handler petition'." (Maj. Op. at [32a, *infra*].) That admission is an understatement. The real problem is not how Oberweis framed his demand, but what he demanded and was provided. He was entitled to ask for and receive a formal adjudicatory hearing that would produce a ruling on the legality of the challenged order. That proceeding would be conducted before an administrative law judge, and the relative merits of Oberweis's assertions and the Secretary's position would be tested and reviewed on the basis of record evidence.[17] What Oberweis sought, however, was a hearing of quite a different sort inquiring into quite a different question—an informal rulemaking proceeding to decide whether the order should be revised.

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[16] *See American Federation of Government Employees* v. *Acree*, 475 F.2d 1289 (D.C.Cir. 1973); *Wolff* v. *Selective Service Local Board*, 372 F.2d 817 (2d Cir. 1967).

[17] 7 U.S.C. § 608c(15)(A) (1976); 7 C.F.R. § 900.50-900.71 (1982). *See* 5 U.S.C. §§ 554, 556-557 (1976 & Supp. IV 1980).

There the decisionmaker would not be limited to record evidence, assertions would not be tested by cross-examination, and (evidently of some importance to those with whom Oberweis made common cause) persons other than producers and handlers would be permitted full participation. In fact, to be entirely accurate Oberweis sought even less than this—namely, merely consideration of *whether* such a rulemaking proceeding would be desirable. The situation is thus quite different from that in cases such as *Joseph* v. *FCC*, 404 F.2d 207 (D.C.Cir. 1968), in which a belated request for public hearing was held to be the equivalent of a motion for reconsideration. There the nature of the consideration which the agency would be compelled to give the two requests was substantially identical; here it is not.

The Secretary gave Oberweis no more than the type of consideration and the scope of determination he requested—which was less than he was required to seek before applying to this court. One can hardly blame the Secretary for not treating the request as (what it clearly was not) a demand for a § 608c (15) (A) proceeding. The first sentence of the petition stated that it was filed "pursuant to" 5 U.S.C. § 553, the general rulemaking provision of the APA and 7 C.F.R. § 1.28, the provision of the agency regulations addressing the filing of petitions for rulemaking. Moreover, the petition was joined by the consumer plaintiffs who had no standing to participate in a § 608c(15)(A) proceeding. Oberweis was not misled regarding the agency's treatment of the petition, since his attorney was advised that, insofar as claims of illegality were concerned, "§ 608c(15)

(A) and (B), provides the means through which any handler . . . may seek legal recourse." [18]

It might be asserted, I suppose, that the agency was too generous in entertaining Oberweis's petition; and that if it did not insist upon the exclusiveness of his § 608c(15)(A) remedy in the administrative proceedings it cannot now do so before the courts. In fact, however, the agency is not asserting that his § 608c(15)(A) remedy is *exclusive*—only that it must be pursued before an attack upon the marketing order itself may be taken to the courts. Nothing prohibits a handler from petitioning for a rulemaking if he wishes, but that petition may, within what has hitherto been considered the broadest discretion, be denied. What the doctrine of exhaustion requires is that in order to challenge the substance of the marketing order the handler must resort—before or after the denial of this discretionary relief—to the much more categorical claim he has upon the agency's attention, namely his right to obtain a full-dress adjudicatory hearing resulting in a ruling on the validity of the order. No such hearing has been requested or held,[19] and no such ruling has issued.[20]

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[18] Letter from Sec. Bergland to Ronald L. Plesser (Aug. 11, 1980), *reprinted in* Jt.App. at 60.

[19] Indeed, not even an informal public hearing was held, though that was requested and considered. *See* Letter from Ronald L. Plesser (appellants' attorney) to Sec. Bergland (July 1, 1980), *reprinted in* Jt.App. at 57; Letter from William T. Manley, Dep. Administrator, Marketing Program Operations, to Ellen Haas and Thomas B. Smith (CNI) (Apr. 7, 1981), *reprinted in* Jt. App. at 170.

[20] The agency's final response denying the petition specified that "in reviewing the petition for rulemaking purposes,

The situation might be different if the denial of the petition for rulemaking were clear indication that the adjudicatory hearing could be of no avail. It is not. Different procedures are prescribed not for their own sake, but for the different effects which they are likely to have upon the outcome. Even if the Secretary's action in denying Oberweis's petition at the conclusion of the informal proceeding could properly be regarded as a determination that the marketing order is valid, it is not certain that the same determination would have been made in the formal proceeding which Oberweis should have demanded.

For the above reasons, I would affirm in all respects the decision of the district court.

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we have not directed our attention" to "[c]laims that the present regulatory treatment of reconstituted milk is not in accordance with law." Letter from William T. Manley, *supra* note 19, at 175.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 80-03077

No. 81-2191

COMMUNITY NUTRITION INSTITUTE, ET AL.,
APPELLANTS

v.

JOHN R. BLOCK, Secretary, United States Department of Agriculture, ET AL.

Appeal from the United States District Court
for the District of Columbia

Before: Tamm, Wilkey and Scalia, Circuit Judges

[Filed Jan. 21, 1983]

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed in part, reversed in part, and the case is

remanded to the District Court for a decision on the merits, all in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: January 21, 1983.

Opinion for the Court filed by Circuit Judge Wilkey.
Opinion concurring in part and dissenting in part filed by Circuit Judge Scalia.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 80-03077

No. 81-2191

COMMUNITY NUTRITION INSTITUTE, ET AL.,
APPELLANTS

v.

JOHN R. BLOCK, Secretary, United States Department of Agriculture, ET AL.

ARGUED 10-4-82

BEFORE: Tamm, Wilkey and Scalia, Circuit Judges

[Filed Mar. 28, 1983]

ORDER

On consideration of the Federal Appellees' petition for rehearing, filed March 7, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Scalia would grant the petition for rehearing.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 80-03077

No. 81-2191

COMMUNITY NUTRITION INSTITUTE, ET AL.,
APPELLANTS

v.

JOHN R. BLOCK, Secretary, United States Department of Agriculture, ET AL.

ARGUED 10-4-82

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

[Filed Mar. 28, 1983]

ORDER

The suggestion for rehearing *en banc* of the federal appellees has been circulated to the full Court and a majority of the Court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges MacKinnon, Bork and Scalia would grant the suggestion for rehearing *en banc*.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 80-03077

No. 81-2191

COMMUNITY NUTRITION INSTITUTE, ET AL.,
APPELLANTS

v.

JOHN R. BLOCK, Secretary, United States Department of Agriculture, ET AL.

ARGUED 10-4-82

BEFORE: Tamm, Wilkey and Scalia, Circuit Judges

[Filed Apr. 19, 1983]

ORDER

On consideration of the petition for rehearing of intervenors-defendants-appellees, filed March 25, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Scalia would grant the petition for rehearing.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 80-03077

No. 81-2191

COMMUNITY NUTRITION INSTITUTE, ET AL.,
APPELLANTS

v.

JOHN R. BLOCK, Secretary, United States Department of Agriculture, ET AL.

ARGUED 10-4-82

BEFORE: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

[Filed Apr. 19, 1983]

ORDER

Intervenors-defendants-appellees' suggestion for rehearing *en banc* has been circulated to the full Court and a majority of the Court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

For the Court:

George A. Fisher,
Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges MacKinnon, Bork and Scalia would grant the suggestion for rehearing *en banc*.

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3077

COMMUNITY NUTRITION INSTITUTE, ET AL., PLAINTIFFS

v.

JOHN R. BLOCK, ET AL., DEFENDANTS

[Filed Sep. 29, 1981]

MEMORANDUM

This suit against the Secretary of Agriculture and the United States Department of Agriculture seeks the invalidation of certain provisions of the Federal Milk Market Orders ("Orders"). 7 C.F.R. § 1000 *et seq.* (1981). The challenged Orders require the "down allocation" of reconstituted milk products [1] and the payment of compensatory payments on those products to regional producers of fresh milk products. This action also asks the Court to compel the Department to hold a hearing on the plaintiffs' petition for a rulemaking concerning the provisions of the Orders that are at issue. Because plaintiffs Harrell, Desmarais, Weinberg, and Community Nutrition Institute do not have standing in this case and because plaintiff Oberweis has not exhausted his administrative remedies, the complaint must be dismissed for lack of subject matter jurisdiction.

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[1] Reconstituted milk is made by combining dried milk powder, water, and butterfat.

I. *Background.*

The Agricultural Marketing Agreement Act ("AMAA") was enacted to correct the "disruption of the orderly exchange of commodities in interstate commerce." 7 U.S.C. § 601 (1976).[2] Pursuant to the AMAA, Milk Market Orders have been issued and adopted in forty-seven regions of the United States. 7 C.F.R. §§ 1001-1139 (1981). These Orders are designed to ensure that producers within a given region receive a uniform minimum price for their grade A milk whether it is consumed in fluid form or manufactured into milk products. *See* 7 U.S.C. § 608c(5) (1976). The Orders divide milk into classes: Class I milk is sold to consumers for drinking; Class II milk or "surplus" is manufactured into various products.[3] Handlers pay a higher price for Class I milk than they do for Class II milk. *Cf.* 7 C.F.R. §§ 1012.50(a); 1012.40(b).

Producers within an Order Area receive a "blend price," a uniform price based upon how much milk in the area is sold for Class I or Class II purposes. The blend price is the total value of all milk used by all handlers in the three classes, divided by the total volume of milk used. *See United States* v. *Rock Royal Co-op*, 307 U.S. 533, 555 (1939). The greater the amount of milk in Class I the higher the blend price.

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[2] The complex provisions of the AMAA have been explained elsewhere. *See United States* v. *Rock Royal Co-op*, 307 U.S. 533 (1939); *Queensboro Farm Products, Inc.* v. *Wickard*, 137 F.2d 969 (2d Cir. 1943). However, a brief review of the relevant provisions is necessary for an understanding of the background of this case.

[3] Some orders divide surplus or manufactured milk into Classes II and III, but for convenience both classes will be termed Class II in this opinion.

See Grant v. *Benson*, 229 F.2d 765, 767 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 934 (1956). Each handler whose total use value of milk for a particular reporting period (i.e., each month) exceeds his payments to producers at the blend price must make a payment to the producer-settlement fund for this excess.[4] Conversely, handlers whose use value is below the blend price are paid from the fund.

Milk produced outside an Order Area but sold by handlers in the area is classified as "other source milk." 7 C.F.R. §§ 1012.14, 1079.14 (1981). If this milk is received in bulk form and produced by dairies subject to another Order, it is allocated into classes and priced in the same proportion as locally produced milk. *Id.* § 1012.44. If received in packaged form, other source milk is treated as Class I milk. *Id.* §§ 1012.44(a)(2), 1079.44(a)(3). Milk from areas with no Order is "down allocated" or presumed to be used for Class II purposes, even if actually used in Class I. *Id.* §§ 1012.44(a)(5)(i), 1079.44(a)(8). Thus, local producers receive credit for a Class I price, and the blend price is raised. Moreover, handlers who receive this milk must also make a "compensatory payment" to the producer settlement fund. This payment generally equals the difference between the Class I price and the blend price. *Id.* §§ 1012.71 (a)(2)(ii), 1079.60, 1079.71(a)(2)(ii).

Reconstituted milk products were unregulated prior to 1964. After notice and a series of hearings, the Secretary issued the current regulations which treat reconstituted milk as "other source" fresh fluid milk.

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[4] For instance, a handler who supplies only whole milk for consumer consumption will have a use value that exceeds the blend price that he pays to producers and must pay the difference into the fund.

7 C.F.R. §§ 1012.14(c), 1079.14(c) (1981). This milk is assumed to have displaced local milk from Class I, and the entire volume is down allocated to the lower value uses. As a result, a comparable volume of local milk is moved into Class I from lower classes. This raises the blend price. *Cf. id.* §§ 1012.44, 1079.44. If a handler has not manufactured enough Class II or Class III products to account for all the reconstituted milk he produced, the deficit is assigned to Class I, and the handler must make a compensatory payment to the local settlement fund equal to the difference between the lower class price and the Class I price. *Id.* §§ 1012.60(e), 1079.60(d).

On August 23, 1979, the plaintiffs filed a petition with the Secretary asking for repeal of the provisions of the regulations that deal with reconstituted milk. The Secretary published a Notice of Request for Hearing and asked for comments on November 16, 1979. 44 Fed. Reg. 65,989 (1979). Eleven months after the petition was filed, the plaintiffs advised the Secretary that if no action were taken they would consider their petition denied. Subsequently, the Secretary published an economic impact analysis of the petition and invited comments. Preliminary Impact Statement, 45 Fed. Reg. 75,956 (1980). This suit was filed on December 2, 1980, and on April 7, 1981, the Secretary denied the petition.

II. *Discussion.*

A. *Standing.*

The Supreme Court has formulated a three-part test to determine whether particular plaintiffs have standing to bring suit: (1) the challenged agency action must cause or threaten to cause the plaintiffs

injury in fact; (2) the alleged injuries must be arguably within the zone of interests sought to be protected by the relevant statute; (3) the relevant statute must not preclude judicial review. *Barlow* v. *Collins*, 397 U.S. 159, 164-65 (1970); *Association of Data Processing Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152-57 (1970). The plaintiffs must also demonstrate that their injuries are capable of redress through the remedy requested and that their injuries are caused by the challenged action of the agency defendant. *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

1. *Injury in Fact.*

Injury in fact is the threshold issue in every federal case because it determines whether the court has power to entertain the suit. *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). This aspect of standing demands that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction" (emphasis in original). *Id.* (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). The injury need not be substantial, *United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973); *Public Citizen* v. *Lockheed Aircraft Corp.*, 565 F.2d 708, 714 (D.C. Cir. 1977), but the injury must be "distinct and palpable," and a "generalized grievance" is not enough. *Warth* v. *Seldin*, *supra*, 422 U.S. at 499. Although indirect harm to a plaintiff will not preclude standing, it will make it more difficult to establish injury in fact by making it more difficult to establish that the injury was a consequence of the defendant's actions and that prospective relief will remove the harm. *Id.* at 505.

In considering a motion to dismiss, the Court must accept as true all material allegations in the complaint and must construe the complaint in favor of the plaintiffs. *Warth* v. *Seldin, supra,* 422 U.S. at 502. Mere allegations are usually sufficient, but if the defendant controverts the allegations, the plaintiff must demonstrate facts supporting his allegations. *Public Citizen* v. *Lockheed Aircraft Corp., supra,* 565 F.2d at 714 n.20; *Sierra Club v. Morton,* 514 F.2d 856, 870 n.20 (D.C. Cir. 1975), *rev'd on other grounds sub nom. Kleppe* v. *Sierra Club,* 427 U.S. 390 (1976). If, after the court provides the plaintiff an opportunity to support its allegations, "the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Warth* v. *Seldin, supra,* 422 U.S. at 501-02.

The question of injury in fact in this case is controlled by the test established by the Supreme Court in *Warth* v. *Seldin, supra,* and *Simon* v. *Eastern Ky. Welfare Rights Organization,* 426 U.S. 26 (1976); and by the Court of Appeals for this Circuit in *Public Citizen, supra.* In essence, this test requires that the plaintiff demonstrate a substantial probability that the requested relief will benefit him in some perceptible and tangible fashion. *See Simon, supra,* 426 U.S. at 38; *Public Citizen, supra,* 565 F.2d at 715. The possibility of relief may not be speculative, *Simon,* 426 U.S. at 44 "remote," *Warth,* 422 U.S. at 507, or "conjectural or hypothetical," *California Bankers Association* v. *Schultz,* 416 U.S. 21, 69 (1974); *Public Citizen,* 565 F.2d at 715.

Individual plaintiffs Harrell, Desmarais, and Weinberg allege that they are cost-conscious consumers of fluid dairy products who "routinely seek to de-

crease food expenditures without sacrificing taste or the nutritional value of their diet." Complaint, ¶ 7. They further allege that the existing regulations have denied them the opportunity to purchase a lower priced reconstituted milk instead of raw fluid milk. *Id.* Plaintiff Community Nutrition Institute is a non-profit charitable organization specializing in food and nutrition issues. It seeks to further the needs of low income consumers.

The complaint alleges that "[i]n some areas of the United States, the cost of manufacturing reconstituted milk *may* be substantially less than the cost of fresh fluid milk." Complaint, ¶ 23. Similarly, "[a] reconstituted fluid product could quickly expand the fluid milk supply when seasonable changes result in a reduction of the whole fluid milk supply." *Id.* ¶ 31 (emphasis added). Other allegations are merely conclusory: "The economic barriers to marketing reconstituted milk created by the existing Orders deprive plaintiffs . . . and other consumers of access to a nutritious dairy beverage at a lower price than fresh drinking milk." *Id.* ¶ 28; and "Elimination of the regulations *could* result in substantial savings to consumers." *Id.* ¶ 38 (emphasis added). Clearly, the statements in the complaint are not enough to establish injury in fact.

The plaintiffs, however, do provide affidavits and other information in support of their allegations. The affidavit of plaintiff Oberweis states: "Absent the compensatory payment, I could manufacture reconstituted milk for less than the price I pay for Class I milk." Affidavit of Joseph J. Oberweis, ¶ 6. The affidavits of Thomas B. Smith demonstrate that the orders do significantly raise the cost of producing reconstituted milk products and make it uneconomic

for handlers to do so under present conditions. *See* Supplemental Affidavit of Thomas B. Smith, ¶ 9. Yet these statements do not demonstrate that a change of this situation would probably benefit consumers. Indeed, the most persuasive statement on this point in the Smith affidavit is a quotation from the Justice Department's comments to the CNI petition: "If local handlers could economically turn to reconstituted milk they would substantially undermine the potential market power of local producers and limit their ability to extract premium prices." *Id.* ¶ 14. This is the only statement that goes even indirectly to the possible benefit to consumers from a change in the Orders.

The plaintiffs also rely heavily on the letter sent to them by the USDA, denying their petition to amend the Orders. Exhibit A to Plaintiffs' Cross-Motion for Summary Judgment. The letter does state that plaintiffs' proposed changes in the Orders would "reduce consumer expenditures by $186 million" and does admit that the availability of a reconstituted milk product "could be expected to make major inroads on the current sales of fresh milk from the southern and eastern districts."

This letter, however, goes on to say that the change in the Orders would cost producers an estimated $576 million dollars and would produce "a radical change in the Dairy industry." This change, according to the letter, might interfere with the public's access to an adequate supply of milk and might result in higher prices for milk products, including milk powder. Thus, the USDA letter does not, when viewed as a whole, demonstrate a substantial probability that the consumer plaintiffs in this case, or, for that matter any consumers, would benefit from a change in the Milk Market Orders.

There are too many variables which would have an effect on consumer prices if the Market Orders were changed. These variables include: whether handlers pass the cost savings on to consumers; whether the change causes a substantial market dislocation, leading to higher overall milk prices; whether increased demand for milk powder will increase its price; whether handlers would dry milk merely to evade the regulations. This situation is, as the Preliminary Impact Statement, 45 Fed. Reg. 75,956 (1980), indicates, extremely complex, and any benefit to the plaintiffs from the proposed changes in the regulations is hypothetical and speculative. Thus, the plaintiffs cannot demonstrate injury in fact and do not have standing.

2. *The Zone of Interests Test.*

The problem of whether consumers are within the zone of interests arguably protected by the cited portions of the AMAA involves a complex matter of statutory construction. The statutory provisions for Orders regulating commodities are in 7 U.S.C. § 608c, which nowhere mentions the interests of consumers. The plaintiffs, however, point to an earlier section of the AMAA which provides that the Secretary will exercise his power "as will provide, in the interests of producers and consumers, an orderly flow of the supply [of the commodity] to market. . . ." 7 U.S.C. § 602(4) (1976). The plaintiffs urge the Court to read this section in connection with § 608c(3) and (4), which provide that Orders are to be issued only if the Secretary finds that "the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter."

The question of what sections of a statute the Court should examine in determining what interests are arguably being protected by a statute was resolved in this Circuit in *Tax Analysts and Advocates* v. *Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). The Court held that the broad general policy section of a statute may be read in conjunction with those sections that are relevant in determining the zone of interest in a particular case if the two parts of the statute share "an identity of purpose." *Id.* at 141; *U.S. League of Savings Associations* v. *Board of Governors of Federal Reserve System*, 463 F. Supp. 342, 349 (D.D.C. 1978); *cf. Constructores Civiles de Centroamerica, S.A.* v. *Hannah*, 459 F.2d 1183, 1188-89 (D.C. Cir. 1972).

Section 608c was enacted in substantially its current form, as part of the Agricultural Adjustment Act Amendments of 1935, 49 Stat. 753 (1935). Section 602(4), on the other hand, was added to the AMAA as a part of the Agricultural Act of 1954, c. 1041, Title IV, § 401(a), 68 Stat. 906 (1954). The 1954 amendments were enacted to counter the falling farm prices caused by the surplus of commodities after the Korean Conflict. H.R. Rep. No. 1927, 83rd Cong., 2d Sess., *reprinted in* [1954] U.S. Code Cong. & Ad. News 3399, 3401. The amendments dealt primarily with price supports and parity pricing. *Id.* at 3399-3400. The House Report on the Act made it clear that the interests of consumers were being taken into account in dealing with these issues. This concern was expressed in terms of the importance of price stability, *id.* at 3407, and abundance of supply. *Id.* at 3402. The Report also makes it clear that farm prices are in large measure independent of the prices consumers pay. *Id.* at 3404.

Nowhere in the House Report is the interest of consumers mentioned in relation to Orders regulating commodities. Indeed, the Orders are not even a significant part of the 1954 Act. The comments on consumers in the legislative history seem primarily aimed at dispelling the misconception that the flexible price-support program embodied in the bill would materially lower consumer prices. *See* House Report, *supra*, at 3404.

The 1935 Act was drafted in response to a substantially different situation. As part of Congress' attempt to speed recovery from the Depression, the amendments sought to "secure fair exchange value for farm products" as their primary objective and also "[b]y restoring and sustaining farm buying power . . . [to] contribute effectively to the general recovery of business." S. Rep. No. 1011, 74th Cong., 1st Sess. 1 (May 13, 1935). The Senate Report also makes explicit the exact purpose of the Orders regulating commodities: "to raise producer prices." *Id.* at 3.

There is only one mention of consumers in the Report, and that is an explanation of the meaning of section 602(2), which was amended by the bill to read: "To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1). . . ." Although the plaintiffs also rely on this section of the statute to support their standing in this case, the Report states that the amendment was enacted to "protect consumers against unwarrantably rapid or excessive prices *increases*" and to ensure that the Secretary of Agriculture had no authority to set prices above the parity level. *Id.* at 5 (emphasis added). Neither the ques-

tion of price increases nor the issue of parity pricing is implicated in this case.

The foregoing review makes several things clear. First, the mention of consumers in 602(4) does not serve the same purpose as the provision for Market Orders in section 608c does, for the two sections were enacted at different times, in response to different problems, and as a part of very different remedies to farm problems. Thus, § 602(4) should not be read in conjunction with § 608c in determining the zone of interests protected by the latter section. Second, the provisions of § 602(2), which were enacted simultaneously with § 608c and which mention the interests of consumers, were enacted with a very specific purpose in mind—to prevent price increases and prices above the parity level. These issues are not relevant to this case; and even if the statute were construed to give consumers standing in some instances, it would not confer standing on these consumers.

This analysis is consonant with the view of the Ninth and Fifth Circuits. In *Rasmussen* v. *Hardin*, the Ninth Circuit stated that Congress did not intend that persons who are affected by an order "only if they choose to buy [a product] and then only in that they must pay a higher price for it, should have standing to seek judicial review." 461 F.2d 595, 599 (9th Cir.), *cert. denied*, 409 U.S. 933 (1972). Although *Rasmussen* was ostensibly decided on the issue of whether the statute precluded consumers from seeking review, the decision also seems to go to the question of the zone of interests protected. Similarly, the Fifth Circuit, in holding that producers have standing under the AMAA to seek judicial review, noted that "[w]e find the generalized interests of consumers in a marketing order totally differ-

ent from the interests of producers. The statute goes to great lengths to guard the interests of producers by providing for administrative hearings and a ratification referendum. No such Congressional deference was shown consumers." *Suntex Dairy* v. *Bergland*, 591 F.2d 1063, 1067 n.3 (5th Cir. 1979). Both of these cases point out that it would make little sense for Congress to provide administrative review for producers and handlers, the two classes most affected by orders, but to allow consumers to go directly to court without having to exhaust any administrative process. If consumers are beyond the zone of protected interests, so too is a group such as CNI which is dedicated to furthering the nutritional interests of consumers.[5]

3. *The Preclusion of Review.*

In *Rasmussen* v. *Hardin*, *supra*, the Ninth Circuit denied consumers standing to challenge Milk Market Orders on the ground that Congress, by providing handlers a special means of challenging the Orders, intended that means of review to be exclusive. 461 F.2d at 599. Other courts have allowed producers standing to challenge Orders. *See Suntex Dairy* v. *Bergland*, *supra*, 591 F.2d at 1067; *Walter Holm & Co.* v. *Hardin*, 449 F.2d 1009, 1011 (D.C. Cir. 1971).

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[5] Plaintiff CNI relies heavily on *Community Nutrition Institute* v. *Bergland*, C.A. 80-0243, Mem. (D.D.C. June 21, 1980), to establish their standing in this case. While that case found a zone of interests that covered "interests regulated as well as protected by the statute in question," *id.* at 5, the statute in the present case, section 608c, cannot be read to protect consumers. Moreover, consumer plaintiffs cannot demonstrate injury in fact in this case. Thus, a group representing the interests of consumers does not have standing to maintain this suit.

Yet, as the court in *Suntex Dairy* made clear, producers have "a definite and direct economic stake in a milk market order." 591 F.2d at 1067 n.3. Moreover, Congress provided producers with administrative review in the form of ratification referenda. *Id.* at 1066. No such review has been provided for consumers to challenge the Orders. Therefore, it is not illogical to infer, as did the court in *Rasmussen*, that Congress intended to preclude consumers from seeking review.

B. *Plaintiff Oberweis.*

Plaintiff Oberweis is a handler as that term is defined by the AMAA. 7 U.S.C. § 608c(1). The statute provides a specific means by which a handler can seek relief from a Market Order. *Id.* § 608c (15)(A). A handler must file a petition with the Secretary of Agriculture and follow the procedures set out in 7 C.F.R. §§ 900.50-900.71 (1981). Plaintiff Oberweis, by his own admission, has not followed this procedure. He claims, however, that he is excused from following the procedure because his petition for rulemaking contained substantially the same information as a handler petition. Consequently, he argues it would be futile for him to pursue further administrative remedies.

The Supreme Court has recognized the importance of these particular administrative remedies: "Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of his ruling, and the elucidation which he would presumably give to his ruling, that resort may be had to the courts." *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946). The purpose of Congress in imposing this particular form

of procedure is also clear: "It is believed that these provisions establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." Senate Rep. No. 1011, *supra*, at 14. To allow a handler to circumvent the review provisions would thwart this purpose, perhaps in some cases with the result of hampering enforcement.

The exhaustion requirement under section 608c has been recognized in this circuit. *See American Dairy of Evansville, Inc.* v. *Bergland*, 627 F.2d 1252 (D.C. Cir. 1980). Although the Court loosely applied the requirement, it would seem that the Court would not allow the terms of the statute to be ignored as they have been by the plaintiffs in this case. Therefore, plaintiff Oberweis must be dismissed for failure to exhaust his administrative remedies.*

III. *Conclusion.*

The consumer plaintiffs do not have standing to maintain this suit, and plaintiff Oberweis has not exhausted his administrative remedies. Therefore, this case must be dismissed for lack of subject matter jurisdiction.

/s/ Oliver Gasch
Judge

Date: Sept. 29, 1981

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* Even if plaintiff Oberweis has substantially complied with the provisions of 7 U.S.C. § 608c(15)(B), venue does not lie in this Court but in the district court in Illinois.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3077

COMMUNITY NUTRITION INSTITUTE, ET AL.,
PLAINTIFFS

v.

JOHN R. BLOCK, ET AL., DEFENDANTS

ORDER

Upon consideration of defendants' and intervenor-defendants' motions to dismiss or, in the alternative, for summary judgment, and upon consideration of the memoranda and exhibits in support thereof and opposition thereto, the arguments of counsel in open Court, and the entire record herein, and for the reasons stated in the accompanying memorandum of even date, it is by the Court this 29th day of September, 1981,

ORDERED that defendants' motion to dismiss be, and hereby is, granted and plaintiffs' complaint is hereby dismissed with prejudice.

/s/ Oliver Gasch
Judge

APPENDIX H

STATUTORY PROVISIONS

The relevant provisions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, are as follows:

§ 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agri-

culture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c (6)(H) of this title, such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public in-

terest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

* * * * *

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans, and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York,

Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees, and naval stores as included in the Naval Stores Act [7 U.S.C. 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin): *Provided,* That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys), eggs (but not excepting turkey hatching eggs), fruits and vegetables for canning or freezing, including potatoes for canning, freezing, or other processing, and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not

the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with re-

spect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(5) Milk and its products; terms and conditions of orders

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, (d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, which need not be

limited to one year, and (e) a provision providing for the accumulation and disbursement of a fund to encourage seasonal adjustments in the production of milk may be included in an order.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative

marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(H) Omitted

(I) Establishing or providing for the establishment of research and development projects, and advertising (excluding brand advertising), sales promotion, educational, and other programs designed to improve or promote the domestic marketing and consumption of milk and its products, to be financed by producers in a manner and at a rate specified in the order, on all producer milk under the order. Producer contributions under this subparagraph may be deducted from funds due producers in computing total pool value or otherwise computing total funds due producers and such deductions shall be in addition to the adjustments authorized by paragraph (B) of this subsection. Provision may be made in the order to exempt, or allow suitable adjustments or credits in connection with, milk on which a mandatory checkoff for advertising or marketing research is required under the

authority of any State law. Such funds shall be paid to an agency organized by milk producers and producers' cooperative associations in such form and with such methods of operation as shall be specified in the order. Such agency may expend such funds for any of the purposes authorized by this subparagraph and may designate, employ, and allocate funds to persons and organizations engaged in such programs which meet the standards and qualifications specified in the order. All funds collected under this subparagraph shall be separately accounted for and shall be used only for the purposes for which they were collected. Programs authorized by this subparagraph may be either local or national in scope, or both, as provided in the order, but shall not be international. Order provisions under this subparagraph shall not become effective in any marketing order unless such provisions are approved by producers separately from other order provisions, in the same manner provided for the approval of marketing orders, and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order. Notwithstanding any other provision of this chapter, any producer against whose marketings any assessment is withheld or collected under the authority of this subparagraph, and who is not in favor of supporting the research and promotion programs, as provided for herein, shall have the right to demand and receive a refund of such assessment pursuant to the terms and conditions specified in the order.

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in

the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products in addition to, or in lieu of, the foregoing terms and condi-

tions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler

may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding clause (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however*, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i).

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds, California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, avocados, apples, raisins, walnuts, or tomatoes, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including

paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: *Provided*, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

(8) Orders with marketing agreement

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become

effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area

producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability

No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity, or product covered by such marketing agreement.

(11) Regional application

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different

terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

(12) Approval of cooperative association as approval of producers

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(13) Retailer and producer exemption

(A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

(14) Violation of order; penalty

Any handler subject to an order issued under this section, or any officer, director, agent, or employee

of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided,* That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with

jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end

of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

(17) Provisions applicable to amendments

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing,

shall be deemed due notice thereof: *Provided further,* That if one-third or more of the producers as defined in a milk order apply in writing for a hearing on a proposed amendment of such order, the Secretary shall call such a hearing if the proposed amendment is one that may legally be made to such order. Subsection (12) of this section shall not be construed to permit any cooperative to act for its members in an application for a hearing under the foregoing proviso and nothing in such proviso shall be construed to preclude the Secretary from calling an amendment hearing as provided in subsection (3) of this section. The Secretary shall not be required to call a hearing on any proposed amendment to an order in response to an application for a hearing on such proposed amendment if the application requesting the hearing is received by the Secretary within ninety days after the date on which the Secretary has announced the decision on a previously proposed amendment to such order and the two proposed amendments are essentially the same.

(18) Milk prices

The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic condi-

tions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

(19) Producer or processor referendum for approving order

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production, as the case

may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section. For the purpose of ascertaining whether the issuance of an order applicable to pears for canning or freezing is approved or favored by producers as required under the applicable provisions of this chapter, the Secretary shall conduct a referendum among producers in each State in which pears for canning or freezing are proposed to be included within the provisions of such marketing order and the requirements of approval or favor under any such provisions applicable to pears for canning or freezing shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of $66\frac{2}{3}$ per centum except that in the event that pear producers in any State fail to approve or favor the issuance of any such marketing order, it shall not be made effective in such State.

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No. 83-458

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, AND UNITED STATES DEPARTMENT OF AGRICULTURE, PETITIONERS

v.

COMMUNITY NUTRITION INSTITUTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 16, 1983
CERTIORARI GRANTED NOVEMBER 28, 1983

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INDEX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GENERAL DOCKET

APPEAL FROM THE DISTRICT COURT

COMMUNITY NUTRITION INSTITUTE, ET AL., APPELLANTS

v.

JOHN R. BLOCK, SECRETARY
UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

No. 81-2191

DATE	FILINGS—PROCEEDINGS
(T)11-12-81	Copies of notice of appeal and docket entries from Clerk, District Court (n-4)
(T)11-12-81	Docketing fee was paid in the District Court on 11/06/81
(V)12-21-81	Notice from District Court stating that record on appeal cannot be transmitted at this time because it cannot be located
(E)01-06-82	Certified Original Record (1 volume) (n-4)
(V)02-16-82	15-Appellants' brief (m-16)
(V)02-16-82	7-Joint appendix (m-16)
(V)03-10-82	4-Appellees' (federal) motion to extend time to file brief to 04/05/82 (m-10)
(C)03-12-82	Clerk's order that the motion of appellees for extension of briefing time is partially granted and the time for filing appellees' brief is extended to and including 4/1/82
(V)03-23-82	4-Appellees' (federal) motion to extend time to file brief to 04/05/82 (m-23)
(V)03-24-82	Clerk's order that appellees' motion for extension of time is granted and the time for filing appellees' brief is extended to and including Monday, April 5, 1982 provided that appellees' brief is physically delivered to the Office of the Clerk by 4:00 p.m. on that date.
(C)04-05-82	15-Appellees' (Fed) brief (m-5)
(C)04-05-82	15-Appellees' (National Milk Producers Fed, et al.) brief (m-1)
(C)04-19-82	15-Appellants' reply brief (m-19)

(B)07-15-82	Letter dated 07-12-82 from Chief Staff Counsel requesting oral argument formats by 07-29-82
(C)08-02-82	Letter dated 7/22/82 from counsel for federal appellee concerning format for oral argument
(C)08-02-82	Letter dated 7/15/82 from counsel for appellants concerning format for oral argument
(C)08-11-82	Clerk's order, sua sponte, that the following times are allotted for oral argument: Appellants—20 minutes; Federal appellees—13 minutes; intervenor-appellees—7 minutes
(B)10-04-82	ARGUED before Tamm, Wilkey and Scalia, CJ's. On motion of Mr. Bells, Mr. Berde, a member of the bar of the Supreme Court of Minnesota, was allowed to argue pro hac vice for appellees.
(S)01-21-83	Opinion for the Court filed by Circuit Judge Wilkey.
(S)01-21-83	Opinion concurring in part and dissenting in part filed by Circuit Judge Scalia.
(S)01-21-83	Judgment by this Court that the judgment of the District Court is hereby affirmed in part, reversed in part, and the case is remanded to the District Court for a decision on the merits, all in accordance with the opinion of this Court filed herein this date.
(S)01-21-83	Mandate order.
(J)02-03-83	1-Appellants' bill of costs (m-3)
(J)02-17-83	4-Appellees' (Federal) opposition to appellants' bill of costs (m-17)
(J)02-22-83	11-Appellees' (National Milk Producers Fed, et al.) motion to extend time to file petition for rehearing and suggestion for rehearing en banc to 03-28-83 (m-16)
(B)03-01-83	4-Appellants' reply to appellees' (fed) opposition to appellants' bill of costs (m-25) (OK,GF)
(V)03-02-83	Per curiam order that the motion of intervenors-defendants-appellees for extension of time in which to file petition for rehearing and suggestion for rehearing en banc is granted and the time extended to and including 03/28/83; Tamm, Wilkey and Scalia, CJs
(J)03-07-83	15-Appellees' (Federal) petition for rehearing and suggestion of rehearing en banc (m-7)

(J)03-25-83	15-Appellees' (Nat'l Milk Producers Federation, et al.) petition for rehearing and suggestions in support of rehearing en banc (m-24)
(V)03-28-83	Per curiam order that the Federal appellees' petition for rehearing, filed 03/07/83 is denied; Tamm, Wilkey and Scalia, CJs (Circuit Judge Scalia would grant the petition for rehearing)
(V)03-28-83	Per curiam order, en banc, that the suggestion for rehering en banc is denied; CJ Robinson, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, CJs (Circuit Judges MacKinnon, Bork and Scalia would grant the suggestion for rehearing en banc)
(S)04-05-83	Copy of opinion and certified copies of judgment issued to District Court. Costs to issue at a later date.
(S)04-07-83	Clerk's order, sua sponte, that the certified copies of judgment and an [sic] copy of the opinion in lieu of formal mandate, issued to the District Court on April 5, 1983 be, and are hereby recalled, and the Clerk of the District Court is directed to return to this Court forthwith the documents issued in lieu of formal mandate.
(J)04-08-83	Mandate returned from Clerk, District Court per order of 04-07-83
(V)04-19-83	Per curiam order that the petition for rehearing of intervenors-defendants-appellees, filed 03-25-83, is denied; Tamm, Wilkey and Scalia, CJs (Circuit Judge Scalia would grant the petition for rehearing)
(V)04-19-83	Per curiam order, en banc, that intervenors-defendants-appellees' suggestion for rehearing en banc is denied; CJ Robinson, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, CJs (Circuit Judges MacKinnon, Bork and Scalia would grant the suggestion for rehearing en banc)
(J)04-22-83	4-Appellees' (Federal) motion to stay issuance of mandate (m-22)
(V)04-26-83	Per curiam order that costs in the total amount of $500.15 are awarded in favor of appellants (Deborah Harrell, Ralph Desmarais & Zy Weinberg) and taxed against appellees (John R. Block, Sec-

retary U.S. Dept. of Agriculture, National Milk Producers Federation, Associated Milk Producers, Inc. and Central Milk Producers Cooperative), jointly and severally. The Clerk is directed to transmit a certified copy of this order to the District Court as promptly as the business of his office permits; Tamm, Wilkey and Scalia, CJs

(V)04-26-83	Certified copy of above order sent to the District Court
(V)05-02-83	Per curiam order that appellees' motion to stay issuance of mandate is granted and the Clerk is directed not to issue the mandate herein for a period of thirty (30) days from the date of this order; Tamm, Wilkey and Scalia, CJs
(J)05-20-83	4-Appellees' (Federal) motion to stay issuance of mandate (m-20)
(V)05-27-83	Per curiam order that appellees' (federal) motion to stay issuance of mandate is denied. The mandate shall issue on 06/02/83, in accordance with this Court's previous order; Tamm, Wilkey and Scalia, CJs
(S)06-02-83	Copy of opinion and certified copies of judgment reissued to District Court.
(J)08-04-83	Copy of letter from Clerk, Supreme Court extending time to file petition for writ of certiorari to 09-16-83 in SC No. A-3
(J)08-04-83	Copy of letter from Clerk, Supreme Court extending time to file petition for writ of certiorari to 09-16-83 in SC No. A-2
(J)11-16-83	Notice from Clerk, Supreme Court that petition for writ of certiorari was filed 09-16-83 in SC No. 83-458
(J)11-29-83	Letter dated 11-28-83 from Clerk, Supreme Court asking that record be certified and transmitted to Supreme Court
(J)11-30-83	Copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 83-458 on 11-28-83
(J)11-29-83	Receipt dated 11-30-83 from Clerk, District Court for Certified Original Record (remaining papers)
(J)12-02-83	Letter dated 12-05-83 from Chief Deputy Clerk to Supreme Court submitting certified record
(J)12-02-83	Receipt from Clerk, Supreme Court dated 12-05-83 for certified record

(V)12-12-83 Per curiam order that the Clerk of the District Court is requested to return to this Court the certified copy of the judgment and the opinion transmitted on June 2, 1983 in lieu of formal mandate; Tamm, Wilkey and Scalia, CJs

COMMUNITY NUTRITION INSTITUTE,
DEBORAH HARRELL, RALPH DESMARAIS, ZY WEINBERG,
JOSEPH OBERWEIS, PLAINTIFFS

v.

BOB BERGLAND, SECRETARY, UNITED STATES
DEPARTMENT OF AGRICULTURE, UNITED STATES
DEPARTMENT OF AGRICULTURE, NATIONAL MILK
PRODUCERS FEDERATION, ASSOCIATED MILK PRODUCERS,
INC., CENTRAL MILK PRODUCERS COOPERATIVE,
INTERVENOR-DEFTS.

DATE	NR.	PROCEEDINGS
1980		
Dec 2	1	COMPLAINT; Exh. A-E; appearance.
Dec 2		SUMMONS (4) and copies (4) of complaint issued. U.S. Atty. serv. 12-3-80. Atty. Gen. serv. 12-8. Defts. serv. 12-9-80.
1981		
Jan 8	2	MOTION by The National Milk Producers Federation, Associated Milk Producers, Inc. and Central Milk Producers Cooperative to intervene as party defts.; P&A's; notice; exhibit. $5.00 paid and credited to U.S. (Appearance of James R. Murphy and Charles W. Bills, 1128 16th St., N.W., Wash., D.C. 20036, 393-8668)
Jan 12	3	CORRECTION to applicant-intervenor's points and authorities filed on 1-8-81.
Jan 16	4	RESPONSE by defts. to proposed intervention.
Jan 16	5	APPEARANCE of Dennis G. Linder and Theodore C. Hart as counsel for defts. CD/N
Jan 22	6	OPPOSITION by pltfs. to motion to intervene of National Milk Producers Federation, Associated Milk Products, Inc., and Central Milk Producers Cooperative; attachment 1.
Feb 2	7	ANSWER of defts. to the complaint.
Feb 2		CALENDARED. CD/N.
Feb 5	8	REPLY of applicant-intervenors to pltfs. opposition to proposed intervention; exhibits 1, 2, and 3.
Feb 6	9	RESPONSE by pltfs. to reply of applicant-intervenors to pltfs. opposition to proposed intervention.

Feb 19	10	MOTION by pltfs. for an order directing defts. to certify and file the administrative record; memorandum.
Feb 19	11	MEMORANDUM. (N) Gasch, J.
Feb 19	12	ORDER granting motion of proposed intervenors to intervene and directing National Milk Producers Federation, Central Milk Producers Cooperative, and Associated Milk Producers, Inc. may intervene as party defts in this action. (N) Gasch, J.
Feb 19	13	ANSWER by intervenor-defts to complaint.
Mar 3	14	STATEMENT of P&A's by intervenor-defts. in opposition to pltfs. motion for an order directing defts. to certify and file the administrative record.
Mar 5	15	OPPOSITION by federal defts. to pltfs. motion to certify and file administrative record; affidavit of Audrey W. Gearhart.
Mar 13	16	REPLY by pltfs. to defts. opposition to pltfs. motion to certify file administrative record.
Mar 20	17	MOTION by Federal Defts. to dismiss or, in the alternative, for summary judgment; statement; P&A's; cases and authorities; affidavit of Herbert L. Forest; Attachment A.
Mar 20		CALENDAR CALL. Federal defts. to file motion to dismiss promptly; Pltfs allowed 30 days thereafter to file their reply; intervenor defts. allowed 15 days after federal defts. motion to dismiss filed to submit additional memoranda; plftfs. to respond 15 days thereafter to intervenor's memoranda, and federal defts. to respond promptly to pltfs. reply. (Rep: R. Griffey) Gasch, J.
Apr 13	18	MOTION by intervenor-defts. National Milk Producers Federation, et al. to dismiss or, in the alternative, for summary judgment; statement of material facts. (FIAT) Gasch, J.
Apr 29	19	STIPULATION approved by the Court allowing pltfs. until 5-1-81 to file their memorandum of P&A's in opposition to respective motions to dismiss or in the alternative for summary judgment by defts. and intervenors. (N) FIAT) Gasch, J.
May 7	20	MOTION by pltfs. to exceed page limitation; memo of P&A's.

May 11	21	CROSS-MOTION by pltfs. for summary judgment; memo of P&A's; affidavit of Thomas B. Smith; exhibits A and B; statement of material facts. (FIAT) Gasch, J.
May 11	22	ORDER allowing pltfs. to file memorandum of P&A's dated 5-1-81 in excess of page limitations. (N) Gasch, J.
May 11	22a	STIPULATION approved by the Court allowing defts. and intervenor-defts. until 5-22-81 to file their memorandum of P&A's in opposition to pltfs. motion for summary judgment. (N) (FIAT) Gasch, J.
May 21	23	MOTION by defts. #1 and 2 for extension of time to 5-28-81 to file and serve oppositions.
May 28	24	ORDER filed May 27, 1981 granting motion of deft. and Intervenor-deft. for extension of time to May 28, 1981, to file opposition to pltf's. cross-motion for summary judgment and pltfs. to reply to deft. and intervenor-deft's. opposition by June 5, 1981. (N) (signed 5/26/81) Gasch, J.
May 28	25	OPPOSITION by Federal Defts. to Statement of Material Facts as to Which Pltffs. contend there is no genuine issue.
May 28	26	MEMORANDUM by Federal Defts. of Points and Authorities in opposition to Pltffs' cross-motion for summary judgment; Table of Contents; Cases and Authorities.
June 1	27	REPLY of Intervenor-Defts., National MILK Producers Federation, Associated Milk Producers, Inc., and Central Milk Producers Cooperative to Pltffs' Memorandum in opposition to defts' Motion to Dismiss or for summary judgment and in support of pltfs' cross-motion for summary judgment; Exhibit A.
June 5	28	REPLY by pltfs. to federal defts. and intervenor-defts. opposition to pltfs. cross-motion for summary judgment; affidavits (2).
Sept 10		MOTION of federal defts. to dismiss and motions of pltfs., defts. and intervenors for summary judgment heard and taken under advisement (Rep: R. Griffey) Gasch, J.
Sept 30	29	MEMORANDUM filed 9-29-81. (N) Gasch, J.

Sept 30	30	ORDER filed 9-29-81 granting motion of defts. to dismiss and dismissing the complaint with prejudice. (N) Gasch, J.
Nov 6	31	NOTICE of appeal by pltfs. from order of 9-29-81. $70.00 paid and credited to U.S. Copies mailed to Dennis G. Linder, Theodore C. Hirt, James R. Mury, Charles W. Bills and Sydney Berde.
Nov 9		COPY of notice of appeal and docket entries transmitted to USCA. USCA#81-2191.
Nov 12	32	RECORD AND ISSUES on appeal by pltf.
1982		
Jan 4		RECORD on appeal delivered to USCA. Receipt ackn.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3077

COMMUNITY NUTRITION INSTITUTE
1146 19th Street, N.W.
Washington, D.C. 20036;

DEBORAH HARRELL
4408 Teal Way
Sarasota, Florida 33580;

RALPH DESMARAIS
2318 Louisiana Street
Little Rock, Arkansas 72206;

ZY WEINBERG
3301 B Cherry Lane
Austin, Texas 78703;

JOSEPH OBERWEIS
609 Gates Avenue
Aurora, Illinois 60505;
PLAINTIFFS,

v.

BOB BERGLAND, SECRETARY
UNITED STATES DEPARTMENT OF AGRICULTURE
14th & Independence Avenue, S.W.
Washington, D.C. 20250;

UNITED STATES DEPARTMENT OF AGRICULTURE
14th & Independence Avenue, S.W.
Washington, D.C. 20250;
DEFENDANTS.

COMPLAINT FOR DECLARATORY ACTION AND INJUNCTIVE RELIEF

1. This action is brought by a nonprofit charitable organization, milk consumers, and a milk handler to review, declare invalid and enjoin enforcement of provisions of the Federal Milk Market Orders ("Orders"), 7 C.F.R. § 1000 *et*

seq., which require down allocation of reconstituted milk products, and which require manufacturers of reconstituted milk products to make compensatory payments on such products to regional fresh milk producers. Such Orders, issued under the Agricultural Marketing Agreement Act ("AMAA"), 7 U.S.C. § 601 *et seq.*, create illegal economic barriers to the marketing by handlers of reconstituted milk products and their ingredients and deprive consumers of a nutritious economically priced substitute for fluid drinking milk.

2. More specifically, plaintiffs contend that the provisions of the Orders requiring down allocation and compensatory payments for reconstituted milk products should be vacated and held invalid because:

(a) they are arbitrary, capricious, unsupported by substantial evidence, and they are unnecessary to effectuate the declared purposes of the AMAA;

(b) they are in excess of the Secretary's statutory authority under the AMAA in that they create an economic barrier to the marketing of reconstituted milk products and their ingredients in contravention of the provisions of section 8c of the AMAA, 7 U.S.C. § 608c; they regulate the price of products manufactured from milk products; they result in nonuniform prices among milk handlers based on use; and they are in direct contravention of the declared policies of the AMAA.

3. This action also seeks a judgment that the Secretary's inaction with respect to plaintiffs' petition to repeal provisions of the Orders applicable to reconstituted milk products and their ingredients constitutes an arbitrary and capricious denial in violation of 7 U.S.C. §§ 608c(3), 608c(15), and 608c(16), and 5 U.S.C. § 553.

JURISDICTION

4. This Court has jurisdiction over this action pursuant to 7 U.S.C. §§ 602 and 608c, 28 U.S.C. §§ 1331, 1337, and 1361, and 5 U.S.C. § 701 *et seq.*

PARTIES

5. Plaintiff Community Nutrition Institute is a nonprofit charitable organization specializing in food and nutrition is-

sues. It is primarily concerned with the development, adoption and implementation of a national food policy which serves the health and economic needs of consumers, particularly low-income consumers. CNI has an institutional interest in seeing that consumers have nutritious dairy products and substitutes available at the lowest possible price. CNI also educates and informs the public about issues regarding food and nutrition.

6. Plaintiff Joseph Oberweis is a handler as that term is defined in the AMAA, 7 U.S.C. § 608c(1), of milk and milk products as that term is defined in the AMAA, 7 U.S.C. § 608c(1). The current regulations relating to reconstituted milk products and their ingredients have created economic barriers preventing Mr. Oberweis from manufacturing and marketing reconstituted milk products as well as milk powder for manufacturing reconstituted milk products. If the regulations were removed, Mr. Oberweis would manufacture and market reconstituted milk products and milk powder for use in manufacturing such products.

7. Plaintiffs Harrell, Desmarais and Weinberg are consumers of fluid dairy products. Due to inflation, they have become extremely cost-conscious and routinely seek to decrease food expenditures without sacrificing taste or the nutritional value of their diet. The existing regulations have denied them the opportunity to purchase a lower priced reconstituted milk product in lieu of raw fluid milk. If such lower priced milk were available they would purchase it.

8. Defendant Bob Bergland is the Secretary of Agriculture ("the Secretary") in whom is vested the authority to implement and enforce the AMAA.

9. Defendant U.S. Department of Agriculture ("USDA") is a department of the Federal Government created by 7 U.S.C. § 2201 and administered under the supervision and direction of the Secretary of Agriculture and is the department of the Federal Government responsible for administering the AMAA.

STATUTORY AND REGULATORY FRAMEWORK

10. The AMAA, enacted in 1937, grants the Secretary of Agriculture the authority to regulate, *inter alia*, the marketing of milk. The declared objectives of the AMAA are, in relevant part, (1) to establish and maintain such orderly marketing conditions as will establish parity prices for farmers and (2) to protect the interests of producers and consumers by establishing and maintaining the conditions necessary to provide an orderly flow of the supply of milk and to avoid unreasonable fluctuations in supplies and prices. 7 U.S.C. §§ 602(1) and 602(4).

11. If the Secretary has reason to believe that issuance of a market order will tend to effectuate the policy of the AMAA, the Secretary is required to give due notice of, and an opportunity for a hearing on, the proposed order. 7 U.S.C. § 608c(3).

12. After the formal hearing, the Secretary shall issue an order if the Secretary finds that the terms and conditions of the order will tend to effectuate the declared policy of the AMAA. 7 U.S.C. § 608c(4).

13. Any handler subject to a milk marketing order may petition the Secretary to modify any provision of an order which is not in accordance with the AMAA. The handler must be given an opportunity for a hearing upon the petition. 7 U.S.C. § 608c(15).

14. Regulations issued by the Secretary require the Secretary to respond to a petition by a handler within 30 days. 7 C.F.R. § 900.52a.

15. Whenever the Secretary finds that any provision of an order obstructs or does not tend to effectuate the declared policy of the AMAA, the Secretary is required to terminate or suspend the operation of such provision. 7 U.S.C. § 608c(16).

16. Milk Market Orders must classify milk in accordance with the form in which or the purpose for which it is used and must fix minimum uniform prices for milk to be paid by handlers based upon such classifications. 7 U.S.C. § 608c(5).

17. Milk Market Orders may not prohibit in any production area the marketing of milk produced in any other production area in the United States. With respect to milk products, marketing agreements or orders may not prohibit or in any manner limit the marketing of milk products produced in any production area in the U.S. 7 U.S.C. § 608c(5)(G).

18. Under the authority of the AMAA, Milk Market Orders have been adopted in 47 regions of the United States. These orders are designed to insure that dairy farmers ("producers") within the geographic region receive a uniform price for their Grade A milk, regardless of whether the milk is ultimately sold to consumers as fresh fluid milk or whether it is used for manufacturing purposes.

19. Each order includes provisions for a classified price plan under which handlers pay minimum prices for producer milk based on the way the raw milk is used. Milk purchased to be resold to consumers for drinking is classified as Class I, the highest-priced class. Milk used to produce milk products such as milk powder, evaporated milk, cream, cottage cheese, yogurt, and ice cream are assigned to Class II, and a lower price is paid by the handler for this milk than for Class I milk. (Some Federal order areas divide milk used to manufacture milk products into two groups, Class II and Class III. This Complaint refers to them all as Class II.)

20. Producers within a given order area receive a uniform or "blend" price, based upon how much milk produced in the order area is sold for Class I or Class II purposes. This blend price is computed from monthly reports filed by handlers within the order area showing how much milk is used for Class I and Class II purposes. Because Class I uses demand a higher price on the market, the greater the amount assigned to Class I use, the higher the "blend" price will be.

21. Reconstituted milk products are regulated under the "other source" milk provisions of the various Milk Market Orders. Originally "other source" milk provisions were used to regulate fresh fluid milk brought into an order area from another area. However, in 1964 the "other source"

milk provisions were expanded to cover the reconstitution of milk powder by milk handlers. Under the Milk Market Orders, a reconstituted milk product, regardless of its ultimate use by the handler, is allocated to Class II. This is referred to as "down allocation". In this manner, a corresponding amount of regional producers' fresh milk purchased for manufacturing purposes is treated as if it were sold in fresh fluid form to consumers. Handlers are thus required to pay Class I prices for this milk even though the milk was purchased for Class II uses.

22. If a handler's Class II utilization is not great enough to offset all the reconstituted milk product manufactured by the handler, then the remainder is categorized as Class I and the handler is required to make a compensatory payment, equal to the difference between the Class I and Class II price level, multiplied by the volume of reconstituted milk product in this category. These compensatory payments are pooled by the Order Administrator and distributed pro rata to the local fresh milk producers.

FACTUAL ALLEGATIONS

23. Reconstituted milk products are dairy-derived substitutes for fluid milk. As used herein, the term includes two categories of products: (1) "reconstituted" milk manufactured by combining water with whole milk powder or nonfat powder (often with butterfat or oil added); and (2) "filled" milk manufactured by combining water with milk powder and adding nondairy fats such as coconut oil or soybean oil. In some areas of the United States, the cost of manufacturing reconstituted milk products may be substantially less than the cost of fresh fluid milk. Milk powder manufactured from milk produced in the upper Midwest, where the cost of production is the lowest, can be shipped to other areas and manufactured into reconstituted milk products for less than the cost of fresh milk produced in those areas.

24. In 1964 the Secretary promulgated an order subjecting reconstituted milk products to the "down allocation" provisions of the Federal Milk Market Orders and requiring handlers who manufacture reconstituted milk products to

make compensatory payments for any reconstituted milk product which could not be assigned to Class II uses. 29 *Fed. Reg.* 9002 (1964).

25. In 1967, following a hearing initiated by the United Dairymen of Arizona, the Secretary issued an order which placed "filled" milk under the same regulatory provisions applicable to reconstituted milk. 34 *Fed. Reg.* 16881 (1969).

26. The down allocation and compensatory payment requirements of the Orders create unfair and artificial barriers to the marketing of reconstituted milk products. When a compensatory payment is added to the actual costs incurred in manufacturing reconstituted milk products, a handler would have to price reconstituted milk products at a price equal to or higher than fresh drinking milk simply in order to recoup his or her costs. Such a price makes reconstituted milk products uncompetitive with fresh drinking milk.

27. The existing Orders create economic barriers to the marketing of milk powder manufactured in the most efficient milk producing areas of the country for use in manufacturing reconstituted milk products throughout the rest of the United States.

28. The economic barriers to marketing reconstituted milk created by the existing Orders deprive plaintiffs Weinberg, Harrel, and Desmarais and other consumers of access to a nutritious dairy beverage at a lower price than fresh drinking milk.

29. The existing Orders create economic barriers which prohibit plaintiff Oberweiss from manufacturing and marketing reconstituted milk products and from manufacturing and marketing milk powder to be sold for manufacturing reconstituted milk products.

30. The existing Orders result in a lack of uniformity of prices for milk handlers. Handlers who either manufacture or purchase dry powder which is sold to consumers to be reconstituted into a fluid milk product at home pay the Class II price for the milk from which the powder is manufactured, and they are not subjected to any compensatory payment requirement. Handlers who manufacture dry powder or purchase dry powder and then reconstitute it for the

consumer are required to make such a compensatory payment.

31. The existing Orders deprive producers and consumers of a stabilizing market influence. A reconstituted fluid product could quickly expand the fluid milk supply when seasonable changes result in a reduction of the whole fluid milk supply. Tight fluid markets and rising fluid prices could be avoided and the size of the reserve fresh whole Grade A milk needed to provide the fluid market could be reduced if such adjustments were possible.

32. In 1976 plaintiff Oberweis submitted to the Secretary a proposal to classify reconstituted milk as the lowest class milk rather than Class I milk under the Chicago Regional Milk Order. By letter dated May 25, 1976, the Secretary denied plaintiff Oberweis' proposal. In 1977, plaintiff Oberweis wrote to the President of the United States urging a change in regulations to permit the manufacture and sale of reconstituted nonfat dry milk. On March 22, 1977 the Acting Deputy Administrator of the Agricultural Stabilization and Conservation Service of the Department of Commerce responded for the President, rejecting Oberweis' petition.

33. On August 23, 1979, plaintiffs submitted a petition to the Secretary requesting that existing Milk Market Orders be amended to exclude reconstituted milk products from the definition of "other source milk" and to eliminate the requirement that handlers who manufacture reconstituted milk products make a compensatory payment to local fresh milk dairy producers. (A copy of the petition is attached hereto as Exhibit A.)

34. On November 16, 1979, the Secretary published a Prenotice of Request for Hearing on the petition and invited interested persons to submit comments on whether or not a hearing on the petition should be held and to submit additional proposals relating to the issue. January 15, 1980 was the deadline for submitting such comments and proposals. 44 *Fed. Reg.* 65989 (1979). (A copy of the November 16, 1980 pre-notice is attached hereto as Exhibit B.)

35. On January 18, 1980 the Secretary published a notice extending the comment period to February 29, 1980. 45

Fed. Reg. 3593 (1980). (A copy of the January 18, 1980 notice is attached hereto as Exhibit C.)

36. On July 1, 1980 plaintiffs wrote the Secretary advising him that if a decision on the petition were not forthcoming, petitioners would have no choice but to consider the petition denied and to take appropriate action. The Secretary, by letter dated August 11, 1980, responded to plaintiffs' letter, but failed to take any substantive action in response thereto. (A copy of plaintiffs' July 1, 1980 letter and the Secretary's August 11, 1980 response are attached hereto as Exhibits D-1 and D-2 respectively.)

37. On November 17, 1980, more than a year after plaintiffs' submitted their petition and more than eight months after the close of the comment period, the Secretary published an economic impact analysis evaluating the effect of plaintiffs' petitions and of an alternative proposal submitted during the comment period. 45 *Fed. Reg.* 75956 (1980). The Secretary invited comments on the impact evaluation to be submitted within 45 days, but did not make any statement with respect to when he expected to make a decision on the plaintiffs' petition. (A copy of the November 17, 1980 notice is attached hereto as Exhibit E.)

38. The Secretary's repeated delays and inaction on plaintiffs' petition has the effect of denying needed relief to plaintiffs. Elimination of the regulations could result in substantial savings to consumers. For handlers interested in marketing either a reconstituted product or milk powder for use in reconstituted products, continuation of the regulations results in substantial economic hardship and unfairness.

39. By his failure to act the Secretary has denied plaintiffs' petition.

PLAINTIFFS' CLAIM FOR RELIEF

40. The AMAA delegates to the Secretary authority to issue Milk Marketing Orders only if the Secretary finds that the issuance thereof will tend to effectuate the declared policy of the AMAA. With respect to the regulations in question, such a finding is arbitrary and capricious and was not supported by substantial evidence. The regulations

are not necessary to protect dairy farmers nor to maintain such orderly marketing conditions to establish parity prices. Moreover, the regulations are inconsistent with and thwart the AMAA's declared policy objective of protecting the interests of producers and consumers by avoiding unreasonable fluctuations in supplies and prices.

41. The Milk Market Orders create an economic barrier to the marketing of milk and milk products in violation of 7 U.S.C. § 608c(5)(G). Moreover, the Orders result in nonuniform prices among milk handlers based on use, in violation of 7 U.S.C. 608c(5).

42. The Secretary has exceeded his authority under the AMAA to set minimum prices for producer milk based on the purpose for which that raw milk is used, instead basing such minimum prices on the purpose for which a milk product is used.

43. The Secretary has ignored the AMAA's mandate under 7 U.S.C. § 608c(3) to hold a hearing on a proposed order whenever there is reason to believe the proposal will tend to further the declared policy of the AMAA. Plaintiffs' petition to the Secretary presented sufficient evidence upon which to reasonably form a belief that adopting the amendment suggested by plaintiffs will effectuate the policy of the AMAA.

44. The Secretary has ignored the AMAA's mandate under 7 U.S.C. 608c(16) to terminate or suspend the operation of any provision of a market order whenever such provision obstructs or does not effectuate the declared policy of the AMAA.

45. The Secretary has deprived plaintiff Oberweis of his statutory right to an opportunity for a hearing upon a petition requesting modification of an existing milk order.

46. The Secretary has unreasonably delayed responding to plaintiffs' petition, and such delay constitutes an unreasonable and arbitrary denial of such petition.

WHEREFORE, plaintiffs pray that this Court enter an Order

(a) declaring the existing Milk Market Orders insofar as they apply to reconstituted milk products and milk powder

used to make reconstituted milk products to be void and invalid and of no force or effect;

(b) enjoining defendants and all those in active concert and participation with them from implementing or in any way enforcing the regulations;

(c) requiring the Secretary to commence expeditious consideration of and grant plaintiffs' petition dated August 23, 1979;

(d) awarding the plaintiffs their costs and reasonable attorneys' fees;

(e) awarding plaintiffs such other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ ____________________

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Dated:

BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE WASHINGTON, D.C.

CHANGES IN THE REGULATORY TREATMENT OF RECONSTITUTED MILK UNDER ALL FEDERAL MILK ORDERS

COMMENTS OF THE ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

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I. INTRODUCTION

On November 13, 1979, the Department of Agriculture invited interested parties to comment on whether a hearing should be held to consider a petition by the Community Nutrition Institute and three individual consumers (hereinafter collectively referred to as "CNI") that the Secretary of Agriculture amend the Federal milk marketing orders as they apply to reconstituted milk. 44 F.R. 65989, November 16, 1979: "Pre-notice of request for hearing and invitation to submit additional proposals or comments."

The CNI petition requested that the orders be amended to (1) remove reconstituted products from the definition of

"other source milk" for the purpose of eliminating the "down-allocation" of milk ingredients used in such products and (2) eliminate the requirement that processors of reconstituted milk products make a "compensatory payment" on such products assigned to Class I. The practical effect of the amendments proposed by CNI would be to eliminate current restrictive provisions that increase the cost of reconstituted milk.

The comment is filed in response to the Department of Agriculture's invitation. The Antitrust Division recommends that public hearings be held to consider changes in the regulatory treatment of reconstituted milk under the Federal milk marketing orders.

II. STATUTORY AUTHORITY

The Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601 et seq.] provides the basic authority for the Federal milk marketing orders issued by the Secretary of Agriculture. 7 U.S.C. 602 declares it to be the policy of Congress:

> (1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.*
>
> (2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1)

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*This provision must be read in conjunction with 7 U.S.C. 608c (18), which provides in pertinent part:

> ...Whenever the Secretary finds ... that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area or, in the case of orders applying only to manufacturing milk, the production area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to asure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest....

of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

* * *

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

* * *

Another section of the Act provides that the Secretary does not have the authority to "prohibit or in any manner limit . . . the marketing in [any marketing] area of any milk or product thereof produced in any production area in the United States." (7 U.S.C. 608c(5)(G))

III. THE CURRENT MILK MARKETING REGULATIONS

A. A Description of the Current Regulations

Federal milk marketing orders set minimum prices for milk according to use. The price for Class I (fluid use) milk is set higher than the price for Class III milk, whose uses include products such as powdered and condensed milk.* The present orders classify reconstituted powder or condensed milk sold in fluid form as a Class I product.

Reconstituted milk is made by combining powdered non-fat dry milk or condensed milk with water. Normally, handlers who make non-fat dry milk or condensed milk pay for the milk they use at the Class III price. In areas covered by Federal milk marketing orders handlers who want to

***In two Class markets powdered and condensed milk are classified as Class II.**

make reconstituted milk would have to purchase this dry or condensed milk at a price that exceeds the Class III price by at least the amount of drying or condensing costs. The regulations require that they also pay to the market administrator the difference between the Class I and Class III prices as a "compensatory payment" for producing reconstituted milk. The combination of the Class III price, the costs associated with drying or condensing, the compensatory payment, and the costs of reconstituting milk insure that reconstituted milk will cost a handler more than fresh whole milk. Consequently, handlers in federally regulated areas presently have no economic incentive to produce reconstituted milk.

B. The Proposed Amendments Would Benefit Farmers, Handlers, and Consumers

Current regulations deny to dairy farmers in efficient production areas access to distant marketing areas. Many local or regional markets are substantially isolated from competition from other areas because fresh milk, which is both heavy and perishable, is expensive to transport over long distances. Farmers in these markets face no competition from distant milk unless they price their milk at a level that exceeds the delivered price of the distant milk.

Condensed or powdered milk is substantially less expensive to transport than fresh milk. The process of going from fresh milk to powder is essentially one of removing water. This reduces the weight to value ratio, which lowers the transport cost per unit of milk solids. If handlers were freed from the regulations that increase the cost of reconstituting milk, they could expand the area from which they procure milk.

Dairy farmers in efficient production areas, such as the Minnesota and Wisconsin region, now produce substantial volumes of milk in excess of their local fluid needs. Presently their milk is largely limited to local fluid markets, with the surplus used for cheese, butter, and powdered milk. Opening Federal order markets to reconstituted milk would allow this surplus to compete in distant fluid milk markets, allow the economy to allocate resources to promote production in those areas which have a relative competitive advan-

tage in milk production, and result in greater overall efficiency. Milk production in efficient areas would be encouraged by higher prices and additional market outlets. Increased competition and lower prices would discourage production in high cost areas, since in these markets local producers are unable to provide sufficient milk for local fluid demand on a year-round basis at prices at or below the cost of reconstituting powdered milk from efficient areas.

Amending the regulations would promote orderly marketing on a seasonal basis. Because of seasonal variation in both the supply of and demand for fresh milk, there are presently markets where supplies of local milk are inadequate to meet consumer demand for fresh milk during some portion of the year. Handlers now meet this seasonal variation by importing fresh milk in bulk. If condensed milk or powder could be imported into these markets to produce a satisfactory reconstituted product, lower total costs for procuring milk would result.

In certain geographic markets where milk is sold at Class I minimum prices, milk cannot economically be reconstituted and sold, even absent the current restrictive regulations. However, in relatively isolated markets local producers bargain over the price of milk for Class I use with local handlers, with the result being that prices above the federal order minimum prices are charged. The cost of alternative supplies of milk places an upper limit on the premium that can be charged in these areas for Class I milk. Because of the expense of transporting distant milk, local producers often can obtain a considerable premium over the Federal order minimum price. Allowing reconstituted milk into these markets would lower these over order premiums.

Consumers also would benefit from amending the regulations. The lower costs that would result from deregulating reconstituted milk would enable consumers to enjoy lower priced products. As noted in CNI's petition, lower priced reconstituted milk products could especially benefit low income consumers, including the elderly and persons on fixed incomes. Milk is one of the most widely consumed products in our economy. A cost increase of even a few cents per gallon of milk aggregates to millions of dollars. Moreover,

there is a significant societal benefit in providing a lower priced nutritional product to the milk consuming public.

IV. CONCLUSION

The Justice Department, in its 1977 report on the effects of government regulation of the dairy industry, concluded:

> Prohibitions upon the reconstitution of milk must of necessity result in a net social cost because there is no conceivable benefit to be derived from keeping a non-hazardous product off of the market*

By eliminating barriers to reconstitution, the report added,

> There would be an adequate supply of fluid (fresh and reconstituted) milk to satisfy consumer demand, and prices would be more stable .... [T]he order system would continue to function, [and] farmers' income would be more stable .... These effects would be observed to different degrees depending upon the extent of consumer acceptance of reconstituted products**

The proposed deregulation of reconstituted milk has the potential for achieving a substantial increase in the economic efficiency of the dairy farming sector of American agriculture. The Antitrust Division believes it would be in the public interest to hold hearings on the CNI petition and urges that this be done.

Respectfully submitted,

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**Milk Marketing*, A report of the U.S. Department of Justice to the Task Group on Antitrust Immunities, January 1977, at 428.

***Id.* at 506-07.

/s/ Michael P. Harmonis

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JANUARY 15, 1980

BEFORE THE
U.S. DEPARTMENT OF AGRICULTURE

HANDLING OF MILK IN FEDERAL
MILK MARKETING AREAS

**COMMENTS OF THE
COUNCIL ON WAGE AND PRICE STABILITY**[1]

The Community Nutrition Institute (CNI), one fluid processor, and three individual consumers have requested a public hearing to consider changes in the regulatory treatment of reconstituted milk products under federal milk orders. The Council on Wage and Price Stability (Council) hereby submits its comments on the U.S. Department of Agriculture's prenotice of the request for hearing (44 *Fed. Reg.* 65989). Attached as Appendix A are the Council's responses to specific questions raised in the prenotice. Attached as Appendix C are the Council's comments on the scope of the proposed hearing.

The Council strongly supports a public hearing to consider amendments to federal milk orders that would eliminate the restrictive pricing provisions for reconstituted milk products.[2] Current milk marketing order provisions artificially increase the prices of reconstituted milk products above the prices of fresh fluid milk. Milk processers ("handlers") in those markets thus have no economic incentive to produce reconstituted milk. Consumers are deprived of an

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[1] The Council on Wage and Price Stability was created by the Council on Wage and Price Stability Act (P.L. 93-387) within the Executive Office of the President. The authority of the Council to intervene in governmental rulemaking and ratemaking proceedings, conferred by Section 3(a) of the Act, has been delegated to the Director of the Council (see 40 *Fed. Reg.* 52882).

[2] Within the definition of "reconstituted milk products" the CNI proposal includes filled-reconstituted milk, whey-soy drinks, and all other milk substitutes manufactured by combining powdered milk products with other liquids. For convenience these comments adopt CNI's definition, although reconstituted products can be manufactured using other technologies.

opportunity to benefit from a technology that would provide, in some markets, a lower-cost alternative to fresh fluid milk. The CNI proposal therefore has significant anti-inflationary potential and would particularly benefit low-income consumers.

I. THE CURRENT MARKETING ORDERS DISCRIMINATE AGAINST RECONSTITUTED MILK PRODUCTS.

The dairy industry is a major part of the American economy. Federal milk marketing orders, authorized by the Agricultural Marketing Agreement Act, regulate the handling and farm-level pricing of about 65 percent of all milk produced in the United States.[3] The present federal milk orders and a number of similar state-enforced pricing programs regulate the treatment of most milk produced in the United States.

There are 47 federal marketing areas, each of which has its own marketing order. Each marketing order establishes minimum prices paid by milk handlers for fluid-eligible milk[4] according to its use—a higher price for milk used in fluid products (Class I) than for milk used in manufactured products (Class II or Class III). The revenues from these sales are pooled for each order so that the individual producer is paid on the basis of a uniform weighted-average price ("blend price"), regardless of how his raw milk is used.

The powder purchased for reconstitution is subject to "other source milk" provisions in the marketing orders. Such treatment requires paying local producers, through the order pool, an "equalization" payment amounting to the difference between the Class I price and the lower manufacturing-class price for raw milk used to make powder.

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[3] Boyd M. Buxton, Milk Marketing Order Regulations, *American Journal of Agricultural Economics*, Vol. 1, No. 4 (Part 2) November, 1979.

[4] Fluid-eligible milk is "Grade A" milk, which meets the highest sanitary standards and can be sold as fluid milk or used for manufacturing products such as butter, cheese, and milk powder. Grade B milk is not regulated under the order system and can only be used for manufacturing purposes.

This equalization is accomplished by the "down allocation" and "compensatory payment" scheme, as described in the Department's prenotice (44 *Fed. Reg.* 65990). The processers of reconstituted milk effectively pay the costs of the raw producer milk at manufacturing-class prices, plus the costs of drying, plus any transportation costs, plus the costs of reconstitution, plus a tax to local producers equal to the Class I differential. The result is that reconstituted milk products would have to be sold at a higher price than fresh milk.

Since the Agricultural Marketing Agreement Act was passed in 1937, the markets for both raw milk supplies and milk products have expanded significantly, due in part to developments in distribution techniques.[5] The federal order system, however, has tended to "freeze in" the local production and distribution system of the 1930's. The overall effect has been to deny the benefits of some of today's technology to producers, handlers, and consumers.[6]

Commercial reconstitution of milk has been technically feasible for a number of years.[7] This technology would make feasible the introduction of lower-cost alternative fluid milk products in many parts of the United States. However, by virtue of the regulatory "tax," which removes any economic incentive to reconstitute milk,[8] these products have effectively been removed from the market. As discussed in Part IV below, this is a result never intended by Congress in the Agriculture Marketing Agreement Act (see 7 U.S.C. 608c(5)(G)).

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[5] Alden C. Manchester, *Pricing Milk and Dairy Products: Principles, Practices and Problems*, USDA, Agricultural Economic Report No. 107 (June 1971), p.3.

[6] Paul W. MacAvoy, *Federal Marketing Orders and Price Supports*, American Enterprise Institute (1977), p.5.

[7] Jerome W. Hammond, Boyd M. Buxton and Cameron S. Thraen, *Potential Impacts of Reconstituted Milk on Regional Prices, Utilization and Production*, Station Bulletin 529, Agricultural Experiment Station, University of Minnesota, in cooperation with the Economics, Statistics, and Cooperative Service, USDA, p.3.

[8] There are also state restrictions on the production and sale of reconstituted products. *Ibid.*, pp. 18-19.

II. THE EFFECTS OF THE PROPOSED AMENDMENTS.

The CNI proposal would amend federal marketing orders to: (1) remove reconstituted milk products from the definition of "other source milk" for purposes of eliminating the "down allocation" of milk ingredients used in such products; and (2) eliminate the requirement that processors of reconstituted milk products make "compensatory payments" for reconstituted products assigned to Class I. Under the CNI proposal, the reconstituted portion of fluid milk products would not be subject to the pricing provisions of the orders. The cost of producing reconstituted milk products would consist only of the costs of ingredients, any transportation costs, and the costs of reconstituting the milk.

Calculations by USDA staff show that the cost to handlers of totally-reconstituted milk products (without the down-allocation or compensatory-payment provisions) would be less than the cost of fresh milk at Class I prices in 27 of the 47 Federal orders.[9] These potential cost savings, if passed on to consumers, would range from less than a penny to 11 cents per gallon for a totally-reconstituted fluid milk product. In short, consumers are currently deprived of the opportunity to purchase a lower-priced alternative to fresh milk.

Attached as Appendix B is a recent study by Hammond, Buxton, and Thraen.[10] This study analyzes the changes that would take place if the regulatory treatment of reconstituted milk products were modified along the lines proposed by the petitioners and appropriate adjustments were made in fresh milk prices. Using a nine-region model, this study examines the effects of using reconstituted milk

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[9] Memorandum on Reconstituted Milk Analysis, from Joel L. Blum, Chief, Program Analysis Branch, Dairy Division, to Dairy Division Staff and all Market Administrators, November 16, 1979. These calculations excluded transport and recombination costs; but these costs are small and their inclusion would not change the result appreciably.

[10] Jerome W. Hammond, Boyd M. Buxton and Cameron S. Thraen, *Potential Impacts of Reconstituted Milk on Regional Prices, Utilization and Production*, Station Bulletin 529, Agricultural Experiment Station, University of Minnesota, in cooperation with the Economics, Statistics, and Cooperative Service, USDA, 1979.

products for blending with locally-produced fresh milk.[11] The study's primary conclusions are as follows:

—Reconstituted milk products would not account for a large percentage of consumption of fluid milk products in any market.

—The introduction of a new lower-cost alternative product would result in a decline in average prices of fluid milk products in all regions except two, the Lake States, and the Southwest. Average price declines for fluid milk products would be greatest in the Northeast, the Southeast, and the South Central regions. Retail price changes would range from an increase of 2 cents per gallon in the Southwest to a decline of 14 cents per gallon in the Southeast.

—If price support purchases are small or nonexistent, the average U.S. manufacturing price would increase moderately. If price support purchases are large, the manufacturing price is not likely to increase at all.

—The blend price and producer cash receipts would decline in four regions (the Northeast, Southeast, South Central, and Mountain States) and would rise in five regions (the Corn Belt, the Lake States, the Plains, the Southwest and the Northwest). Nationally, producer cash receipts would decline.

—While total raw milk production would decline slightly (by 0.2 percent), consumption of fluid milk products would increase (by 1.2 percent).

— Raw milk production would decline in four regions (the largest impacts being a 0.9 percent decline in the Northeast and a 1.6 percent decline in the Southeast) and rise in five more efficient producing regions.

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[11] See especially pp. 12-18. This study assumes that the blended product would be a perfect substitute for fresh whole milk and that state regulations would not impede its introduction. Modifying these assumptions would not alter the general qualitative results of the analysis, although the magnitude of the adjustments on prices and quantities would be affected. The analysis uses 1976 data, but the direction of change would be similar if estimated for other years.

—More efficient use of economic resources would increase social welfare by from $22 to $25 million annually. That is to say, the current regulations imply a waste of economic resources equal to that amount.

While the Hammond study provides an indication of the types of changes that are likely to take place after the various markets have fully adjusted, the magnitude of these changes will depend on the validity of the underlying assumptions. For instance, the study assumes that blended reconstituted products would be perfect substitutes for fresh whole milk; and if, as is likely, consumers will prefer fresh milk, the impact of blended products on Class I differentials would be less than predicted by Hammond.

In sum, the benefits to the consumer of eliminating the present restrictions on reconstituted milk appear to be substantial, including considerably more efficient use of our nation's economic resources. The CNI proposal warrants a public hearing.

III. THE PROPOSAL WOULD FURTHER THE GOALS OF THE ACT.

The basic objectives of the Agricultural Marketing Agreement Act are to: 1) establish and maintain orderly marketing conditions; 2) establish price to producers that will assure an adequate supply of milk, and 3) protect the interests of consumers and the public (7 U.S.C. 602). In the Council's view, lifting the restrictions on reconstituted milk is consistent with the goals of the market-order program.

As noted in Part II above, even if reconstituted milk products could be marketed without down allocations or compensatory payments, the introductions of these products is not likely to disrupt the market. It is unlikely that consumers would consider reconstituted products as a perfect substitute for fresh milk; indeed, such products would have to be labeled and marketed separately. Even if reconstituted products were a perfect substitute, as assumed by the Hammond study, consumption of reconstitued products would rise to only 2.2 percent of total fluid sales in the Southeast, the largest of any region. Hammond's study indicates that local fresh milk supplies within about 500 miles

of any market would be used rather than importing ingredients. In addition, state and local restrictions on reconstituted products will impede their introduction into a number of marketing areas.

Although removing the restrictions on the marketing of reconstituted milk products will lead to price and quantity adjustments, this transition will not cause disorder in the milk marketing system. Indeed, these changes would likely contribute to orderly marketing and increase market stability because: 1) dried milk can be easily stored and inexpensively shipped; and 2) reconstituted milk products could be used to provide an alternative supply of fluid milk products when fresh milk supplies are tight, thereby helping to coordinate seasonal variations in supplies and demands. Although milk production in some marketing areas would decline over time, production in the efficient dairy regions would increase and overall economic efficiency and stability would be enhanced.

In addition, federal-order pricing without restrictions on reconstituted products would still generate prices sufficient to assure adequate supplies of fluid milk. In fact, the total use of fluid milk products would increase. While the revenues received by producers in some regions would decline, revenues to producers in other regions would increase. And the existence of reserves in the form of powder would protect against supply shortfalls.

Further, the interest of consumers would be well served by removing the restrictions on reconstituted milk products. A lower-cost alternative to fresh milk would be available, in some areas Class I prices would be reduced, and the overall public welfare would be improved due to more efficient utilization of economic resources.

IV. THE PRESENT RESTRICTIONS ON THE MARKETING OF RECONSTITUTED MILK PRODUCTS ARE ILLEGAL TRADE BARRIERS.

As discussed in Part I above, application of the down-allocation and compensatory-payment provisions to the reconstitution of powder into fluid milk products has virtually eliminated such products from the market. These provi-

sions are inconsistent with Section 8c(5)G of the Agricultural Marketing Agreement Act, which states:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

This prohibition against trade barriers was analyzed by the Supreme Court in *Lehigh Valley Corp.* v. *United States* (1962) 370 U.S. 76. The milk marketing order in *Lehigh Valley* contained a compensatory payment provision that effectively required handlers who purchased milk from outside the marketing area to pay into the local producer pool an amount equal to the difference between the local Class I price and the manufacturing class price. As amici curiae, the dairy industry asserted that Section 8c(5)G only authorized outright prohibition of the importation of milk from other production areas. The Court held, however, that the word "prohibit" as used in the Act is not limited to absolute or quota physical restrictions; it also includes economic trade barriers such as a compensatory payment scheme that makes it uneconomical to market milk from outside the order area (370 U.S. at 97).[12]

The present order treatment of reconstituted milk closely parallels the compensatory payment scheme struck down in *Lehigh Valley*. As in that case, the present order provisions do not take into account the real costs of purchasing powder or reconstituting the milk product (370 U.S. at 84). As in that case, "the effect of the fixed compensatory payment is to make it economically unfeasible for a handler to bring such milk products into the marketing area" (*id.*). As the Supreme Court stated in that case:

> "A close examination of the workings of the present compensatory payment provision reveals that its effect is to preserve for the benefit of the area's producers

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[12] *Mills* v. *Freeman* (D. Md. 1961) 294 F. Supp. 119, seemed to adopt a meaning for "prohibit" that is somewhat inconsistent with the Supreme Court's treatment. But the Supreme Court's treatment is binding.

> the blend price that they would receive if all outside milk were physically excluded and they alone would supply the fluid-milk needs of the area" (370 U.S. at 89).

In sum, the Secretary of Agriculture can establish incidental order provisions to protect the classification scheme (7 U.S.C. 608c(7)(D)). There is serious question, however, whether the present trade restrictions on the marketing of reconstituted milk products are valid. A public hearing on the treatment of reconstituted milk products is thus not only desirable as a matter of economic policy but also will further the provisions of the Agricultural Marketing Agreement Act.

Respectfully submitted,

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FEBRUARY 29, 1980

APPENDIX A

The Council's Responses to Questions in Prenotice of Request for Hearing (44 *Fed. Reg.* 65989-65991)

A. First set of questions beginning at 44 *Fed. Reg.* 65990:

Q 1. Is the proposal consistent with the requirement in the Agricultural Marketing Agreement Act that milk in similar uses be priced uniformly to handlers and, if not, what order changes would be consistent with such requirement and still carry out the intent of the proposal?

A. Although Section 8c(5)(A) of the Act requires raw milk to be classified according to the purposes for which it is used, the "use" is that of the handler who first purchases from the producer. The CNI proposal would not change this statutory requirement. The down-allocation and compensatory-payment provisions, on the other hand, are authorized under Section 8c(7)(D) of the Act as incidental provisions that may effectuate other aspects of the marketing orders. These incidental provisions are not statutorily required.

Q 2. Does the pricing of reconstituted products made entirely from powder and the pricing of blended products that contain a mixture of reconstituted milk and fresh milk present separate and distinguishable issues? If so, is there a need to consider different regulatory techniques for wholly reconstituted products versus blended products?

A. A 100% reconstituted milk product is a separate and distinct product from a blended milk product. In the Council's view, however, the reconstituted portion of blended products should be treated the same as totally reconstituted products.

Q 3. What are current State legal requirements on the processing, distribution, and labeling of wholly reconstituted products and blended products and do these requirements raise any important factors that need to be considered in conjunction with the proposal?

A. The regulatory treatment of reconstituted milk by states is described in the study by Hammond,

Buxton and Thraen, Appendix B, pp. 18-20. However, these regulations would not as a matter of law and should not as a matter of policy affect the treatment of reconstituted products under federal milk orders.

Q 4. Would the adoption of this proposal result in a need for substantive or conforming changes in the various order definitions, e.g., route disposition, distributing plant, supply plant, pool plant, other source milk, and fluid milk product?

A. The proposal specifically requests a change in the definition of "other source milk" as it is applied to reconstituted milk. It is not readily apparent what other changes would be needed, if any, and such changes should not be considered in this proceeding. (See the Council's comments on scope, Appendix C.)

Q 5. Would the adoption of the proposal require substantive or conforming changes in the classification provisions, e.g., classes of utilization, classification of transfers and diversions, general classification rules, and classification of producer milk?

A. Under the proposal, the reconstituted portion of fluid milk products would not be subject to the classified pricing provisions of the orders. If any of the classifications, diversions, or transfers are inconsistent with these proposed changes, those definitions would need to be changed.

Q 6. Would the adoption of the proposal require changes in either the order obligations or scope of regulation with respect to partially regulated distributing plants and producer-handlers?

A. The proposal only requests changes in the treatment of reconstituted milk, and such changes would not seem to require modifications of regulations concerning partially regulated plants and producer-handlers. If minor changes in some provisions may later prove necessary in particular market orders, they could be modified in subsequent proceedings (see Council's comments on scope, Appendix C).

Q 7. Does the adoption of the proposal also raise the issue of the appropriateness of the current Class I differentials and location adjustments under the orders? If so, what should such Class I differentials and location adjustments be?

A. The introduction of a new alternative product competing with fresh milk would, in some regions and over time, place downward pressures on fresh milk prices. However, the magnitude of the changes which may be necessary cannot be known unless and until reconstituted milk products are actually introduced into the market and the markets are given an opportunity to adjust. Therefore, while the level of Class I differentials is relevant to a hearing on changes in the regulatory treatment of reconstituted milk, specific proposals to change Class I differentials should only be considered on an order-by-order basis at a later time. Attached as Appendix C are the Council's views on the scope of the proposed hearing.

Q 8. Would the adoption of the proposed pricing for reconstituted milk require a change in the classification and pricing of condensed skim milk or condensed whole milk if the condensed product is used to reconstitute milk for fluid uses?

A. The CNI petition does not address the treatment of condensed milk products.

B. Second set of questions beginning at 44 *Fed. Reg.* 65991:

Q 1. What effect would the adoption of the proposal have on the achievement of the goals of the Agricultural Marketing Agreement Act?

A. Adoption of the proposal would be consistent with the goals of the Act, as discussed in the Council's Comments (pp. 8-10).

Q 2. Would the adoption of the proposal result in major adjustment costs for dairy farming and in processing facilities? Would this impact be different in different regions? How might the adjustment costs be minimized?

A. Estimates of the different regional impacts obtained by Hammond, Buxton, and Thraen (pp. 13-17) are discussed in the Council's Comments (pp. 5-8). The economic changes would not be in the same direction in all regions and, in addition, would depend on consumer acceptance of these alternative products. Given the magnitude of the estimated changes, we would not anticipate major adjustment costs for dairy farming or processing. Moreover, we believe that any such

changes would take place over a period of time, thereby allowing for an orderly transition for producers and handlers.

Q 3. What implications would the adoption of the proposal have on energy use in the processing, distribution, and transportation of all dairy products?

A. The Council believes that removing the restrictions on the marketing of reconstituted milk products will result in overall economic and energy efficiency (see Council's Comments at p. 8). Although additional costs will be incurred in the drying and reconstituting processes, these costs will be offset by savings in storage and transportation.

Q 4. How would the adoption of the proposal affect the aggregate consumption of dairy products? Would adoption of the proposal substantially alter the utilization of milk in different products and among different income groups? What are the nutritional implications of adopting the proposal?

A. Adoption of the proposal would result in an increase in aggregate consumption of fluid milk products. The impact of the proposal on consumption of manufactured products and total consumption of dairy products depends on the effect of the price support program. If price support purchases are small or nonexistent, consumption of manufactured products and total consumption of dairy products will decline moderately. If price support purchases are large, consumption of dairy products should rise.

Low-income consumers may well be more sensitive to dairy price changes, and therefore would benefit more from the introduction of lower-priced alternative products. All consumers would benefit, however.

Q 5. What regional implications does adoption of the proposal have for dairy farmers? What implications for producers of Grade A milk versus Grade B milk?

A. Estimates of the regional impacts on producers of Grade A milk are discussed in Hammond, Buxton, and Thraen (pp. 13-77) and the Council's Comments (pp. 6-8). Returns and prices for Grade B milk would probably not change if price support purchases are large, and would likely increase if price support purchases are small or nonexistent. There will also be shifts in production to more efficient production re-

gions, and overall economic efficiency will be increased.

Q 6. What economic implications, including those of a regional nature, does the adoption of the proposal have for consumers? What implications for fluid milk consumers versus consumers of manufactured dairy products?

A. Consumers in the aggregate would save. The discussion in Hammond, Buxton and Thraen (pp. 13-17) and the Council's Comments (pp. 5-8) show that prices for fluid milk products would decline in all regions except two. Retail price changes would range from an increase of 2 cents per gallon in the Southwest to a decline of 14 cents per gallon in the Southeast. The implications for prices and consumption of manufactured products are similar in all regions and are discussed in the answers to questions 4 and 5 above.

Q 7. Would the adoption of the proposal affect the dairy industry's ability to balance seasonal patterns of milk production and consumption? Would the needed reserve requirements for fluid markets be changed?

A. The adoption of the proposal would increase the industry's ability to balance seasonal patterns of consumption and production and reduce the needed reserves for fluid markets. (See Hammond, Buxton, and Thraen, p. 18 and Council's Comments, pp. 9-10.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3077

COMMUNITY NUTRITION INSTITUTE, ET AL., PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS,

and

NATIONAL MILK PRODUCERS FEDERATION, ASSOCIATED MILK PRODUCERS, INC., AND CENTRAL MILK PRODUCERS COOPERATIVE, INTERVENOR-DEFENDANTS.

AFFIDAVIT

City of Washington)
) ss
District of Columbia)

Herbert L. Forest, being duly sworn, deposes and says:

1. I am the Director, Dairy Division, Agricultural Marketing Service, United States Department of Agriculture. The statements in this affidavit are based upon my personal knowledge or upon official records of the United States Department of Agriculture.

2. I was graduated from the University of Massachusetts and did post graduate work in economics at Harvard University. In 1935 I joined the staff of the Dairy Section of the United States Department of Agriculture and continued in that capacity, except for a brief time during World War II, until I was appointed Director, Dairy Division, Agricultural Marketing Service, in May 1954. Since joining the Dairy Section in 1935, I have been in intimate contact with the development and administration of federal milk marketing orders and since 1945 have had increasing responsibility for their formulation and the supervision of their administration in all marketing areas under regulation.

3. I make this affidavit in support of the government's motion to dismiss or in the alternative for summary judgment.

4. The marketing order provisions which include reconstituted fluid milk in the Class I pricing provisions of the federal milk marketing orders, challenged by plaintiffs in this proceeding, were adopted by the Secretary in 1963 and 1964. With regard to 15 New England and Northeast markets, formal rulemaking hearings were conducted: on September 13-14, 1962 and March 5-April 2, 1963, in Philadelphia, Pennsylvania, to take evidence with respect to federal milk marketing orders Nos. 1004 and 1010 (7 CFR 1004 and 1010, except that these orders have been merged into a single order for the Middle Atlantic Region, No. 1004, since 1963); on September 5-21, 1962 and April 1-19, 1963, in New York City and Woodbridge, New Jersey, respectively, to take evidence on orders Nos. 1002 and 1015 (7 CFR 1002 and 1015, except that these orders have been merged since 1963); and on May 6-23, 1963, in New York City, to take evidence with respect to orders Nos. 1001-1004, 1006, 1007, 1010, and 1014-1016 (7 CFR 1001 etc., except that some orders have been merged or terminated since 1963). Based on the hearing records thus developed, the Secretary issued initial decisions recommending adoption of various order provisions (see 28 FR 3419, 6139, 6171, 7598 and 10646). Thereafter, in November 1963 final decisions adopting various provisions were published (28 FR 11848, 11956 and 12000). With regard to other marketing areas, formal rulemaking hearings were conducted on January 2-4 and 23-25, 1963, in Arlington, Virginia, to take evidence with respect to federal milk marketing orders Nos. 1003, 1005, 1008, 1009, 1011, 1013, 1016, 1033-1037, 1040-1044, 1046-1049, 1090, 1098, 1101 (7 CFR 1003, etc., except that some orders have been merged with other orders or terminated since 1963). On January 8-11, 1963, a second hearing was held in St. Louis, Missouri, for the purpose of taking evidence with respect to federal milk marketing orders Nos. 1030-1032, 1038, 1039, 1045, 1051, 1061-1064, 1067-1070, 1078, 1079, 1094, 1096, 1097, 1099, 1102, 1103, 1105, 1107, and 1108 (7 CFR 1030, etc., except that some

orders have been merged with other orders or terminated since 1963). A third hearing was held on January 14-18, 1963, in Denver, Colorado, where evidence was presented with respect to federal milk marketing orders Nos. 1065, 1066, 1071-1076, 1104, 1106, 1120, 1125-1138 (7 CFR 1065, etc., except that some orders have been merged with other orders or terminated since 1963). Based on the evidence introduced at these hearings and the records thereof, the Secretary issued initial decisions recommending adoption of the order provisions regulating reconstituted milk (29 FR 2001, 29 FR 2101, and 29 FR 2202, respectively). Comments received in response to these recommended decisions were considered by the Secretary and then in July 1964, he published final decisions adopting the marketing order provisions under consideration (29 FR 9002, 29 FR 9110 and 29 FR 9214, respectively). Following the publication of all of these decisions, the amended order provisions were subjected to producer referendums in each of the affected marketing areas and were favorably approved by the requisite number of producers.

5. The contested order provisions were thereafter extended, in 1969, to apply to reconstituted fluid milk used in the processing of filled milk. Following publication in the Federal Register of the Notice of Hearing listing various issues for consideration, the Secretary convened a national hearing on April 23-24, and May 21-24, 1968, in Memphis, Tennessee, for the purpose of taking evidence with regard to the appropriate regulatory treatment of reconstituted milk used to make filled milk. With regard to the central Arizona order, the record from a hearing previously convened on February 7-10, 1967, was reopened as part of the national hearing. On June 17, 1969, recommended decisions were issued covering proposed changes in all then existing milk orders (34 FR 11802 and 11809). Following receipt and analysis of comments received in response to the recommended decisions, the Secretary issued final decisions approving and adopting the provisions for all milk marketing orders (34 FR 16548 and 34 FR 16881). The amendments were thereafter voted on in producer referendums and approved by the requisite number of producers.

6. Under the present marketing order system milk is classified on the basis of the use to which it is put by each handler. Class I is the highest value use and Class II and Class III (in a three class market) represent the lower value uses. Each order presently defines reconstituted milk that is used for fluid consumption as a "fluid milk product" and includes it in Class I, the same as fluid milk products made from raw producer milk. This assures that all milk used for fluid consumption is priced at least at the minimum Class I price level. Each of the 47 orders operates so that milk from producers is followed to its ultimate use by a plant and priced according to that use. If a handler obtains his entire supply of milk from producers and has only Class I sales, all of the milk is priced in Class I even if the handler first dries producer milk and then uses it in reconstituted fluid milk. However, a handler may use powder processed from producer milk received in a prior month or powder from other federal order markets or from unregulated sources, which in these instances was made from milk priced only at the lower manufacturing value. To prevent such reconstituted milk from being priced differently from other milk in fluid uses, and thus, resulting in nonuniform prices to handlers, the orders are designed so that the reconstituted milk made from such "other source milk" is priced on an equal basis with the price charged the handler making reconstituted milk from current receipts of producer milk. This is accomplished by assigning reconstituted milk made from such powder to the lower-valued uses of a handler. This process is commonly referred to as "down-allocation." If the handler does not have sufficient Class II (or Class III) utilization in his plant to cover the quantity of reconstituted milk, the remainder is assigned to Class I. In that event, the handler is required to make a "compensatory payment" with respect to the quantity assigned to Class I. The payment is equal to the difference between the order's Class I and Class II prices (in a two-class market) and is distributed to producers supplying milk in the marketing area.

7. The Agricultural Marketing Agreement Act provides in Sections 608c(3) and (4) as follows:

(3) Notice and hearing.

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order. (7 U.S.C. 608c(3)).

(4) Finding and issuance of order.

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity. (7 U.S.C. 608c(4)).

Section 608c(17) provides that the procedure applicable to the issuance of such marketing orders shall also be applicable to amendments to such marketing orders.

Accordingly, a critical element that must be determined by the Secretary prior to noticing a proposal for hearing is whether the issuance of that proposal as part of a marketing order "will tend to effectuate the declared policy" of the Act. The Secretary is also required, when issuing an order, to make a finding that the issuance of such marketing order or amendment thereto is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy of the Act and is approved or favored by at least two-thirds of the producers voting in a referendum. (7 U.S.C. 608c(9)(B)).

8. The essence of the CNI proposal is to amend the marketing orders so as to reclassify commercially processed reconstituted milk in the lowest price class of each order and thereby remove such milk from the Class I pricing provisions of the orders. These proposed amendments raise very complex issues which cut through to the very heart of the milk marketing order system and, if adopted, will substantially impact on the dairy industry of this nation. Furthermore, while there are, at the present time, serious

unresolved questions as to whether the proposed amendments will in fact tend to effectuate the declared policy of the AMAA, it is clear that noticing the proposal for hearing will commence a process requiring substantial expenditures of time and money by the proponents of change, the opponents of change and the federal government. For these reasons, following the receipt of plaintiffs' petition for rulemaking on or about August 28, 1979, the Department initiated a comprehensive investigation, which is still in progress, to determine whether a notice of hearing should be issued. The investigation has resulted in the Department's receipt of over 9,000 public comments and has involved preparation of a detailed economic impact statement analyzing the potential effects of the proposed amendments. The Department's activities in this regard are listed chronologically (some of the dates are approximated) in the lettered paragraphs which follow.

a. 8/31/79—Acknowledged receipt of the CNI petition.

b. 9/10/79—Completed for Departmental use a brief issues paper on the reconstituted milk proposal. The paper raised three general concerns regarding the proposal, i.e., legality, variable regional impact and cost to society.

c. 9/14/79—Completed Part I of the briefing paper on the proposal for Departmental use. The paper summarized the proposal and the current regulatory treatment of reconstituted milk.

d. 9/28/79—Sent a letter to CNI indicating that clarification of the proposal would be needed before the petition could be considered further.

e. 10/5/79—Sent a letter to CNI asking questions to help clarify the proposal.

f. 10/5/79—Completed Part II of a briefing paper on the proposal for Departmental use. The paper made assumptions on how the proposal should be interpreted and set forth some general observations on the probable impact on handlers, consumers, and producers. The paper also set forth policy issues relative to the proposal and alternative actions and their impact.

g. 10/17/79—A meeting of representatives from various Departmental agencies was held concerning procedures

that would be involved if a hearing were held on the CNI proposal.

h. 10/23/79—Completed for Departmental use some observations regarding the University of Minnesota Study on reconstituted milk that was done by Jerome Hammond, Boyd Buxton and Cameron Thraen. This study was referred to in the CNI petition.

i. 10/25/79—A meeting of representatives of the Department and CNI was held to discuss the reconstituted milk proposal and the questions asked in the Department's 10/5/79 letter to CNI.

j. 10/26/79—Sent a letter to CNI concerning the 10/25/79 meeting about the proposal. Letter stated that the Department planned to move ahead with a pre-notice of hearing to inform the public of the petition and that a public hearing was being considered.

k. 11/1/79—Received a letter from CNI responding to questions presented in the Department's 10/5/79 letter.

l. 11/8/79—Sent a letter to all market administrators requesting their attendance at a meeting on 12/6/79 with members of the Washington Dairy Division staff to discuss the reconstituted milk proposal. Written comments on the proposal were requested from each by 11/30/79.

m. 11/9/79—Completed for Departmental use a paper titled, Comments on Study by Jerome W. Hammond, Boyd M. Buxton and Cameron S. Thraen entitled *Potential Impacts of Reconstituted Milk on Regional Prices, Utilization, and Production*, Station Bulletin 529, Agricultural Experiment Station, University of Minnesota, 1979. This study was referred to in the CNI petition.

n. 11/13/79—Completed for Departmental use comparisons of the cost of fresh skim milk to the cost of Grade A powder.

o. 11/16/79—Issued a pre-notice of request for hearing on the CNI proposal and invitation to submit additional proposals. The pre-notice summarized the proposal and the current regulatory treatment of reconstituted milk. Comments were requested on the proposal as well as eight issues that were identified as possibly being related to the proposal. The pre-notice also asked seven specific questions

that were developed in connection with the Department's efforts to analyze the potential impact of the proposed changes, as well as comments on whether a hearing should be held. Comments and alternative proposals were to be filed by 1/15/80. (Exhibit B to the Complaint).

The pre-notice was published in the Federal Register (44 FR 65989) and mailed to all market administrators for further distribution pursuant to the interested party list for each Federal order market. The pre-notice was also mailed to 50 governors and a list of consumer-oriented groups or individuals, some of whom were identified for mailing by CNI.

p. 11/20/79—A meeting of representatives from several Departmental agencies was held to discuss the development of a pre-hearing impact statement concerning the CNI proposal and alternative options. The statement was to be developed as an aid in determining whether a hearing should be held.

q. 12/6/79—Meeting was held with all market administrators concerning the CNI proposal.

r. 12/10/79-10/24/80—Received, reviewed, categorized and filed comments submitted by interested parties in response to the pre-notice of request for hearing. Comments received after the 2/29/80 deadline were included since the Department had not yet decided whether a hearing should be held (work was continuing on the development of the preliminary impact statement). In total, 8,949 letters were received from interested parties, most being received from dairy farmers (8,113). (Some dairy farmers wrote more than one letter).

s. 12/18/79—Completed for Departmental use a set of questions and answers on the pricing of reconstituted milk under federal orders.

t. 12/28/79—Completed for Departmental use a report on the impact of reconstituted milk on the cost of nutrition to consumers and on the cost of the dairy price support program.

u. 1/4/80—A meeting of representatives from several Departmental agencies was held to discuss a draft of the impact analysis regarding the CNI proposal.

v. 1/15/80—Issued a public notice extending the time for filing comments and alternative proposals as solicited by the pre-notice of request for hearing. The time was extended to February 29, 1980. Extension of time had been requested by representatives of the dairy industry on the basis that they did not have sufficient time to analyze the impact of the proposal and prepare their comments. The notification procedure utilized was the same as that utilized for the pre-notice except that an additional 190 interested parties associated with a proposed federal order for the Boise area were included. (Exhibit C to the Complaint).

w. 1/21/80—A meeting of several Department officials was held to discuss the adequacy of public participation in the deliberations on the reconstituted milk issue. It was decided to prepare a fact sheet about the proceeding for dissemination to the public.

Another meeting of Department officials was held to discuss legal questions relating to the CNI proposal.

x. 1/30/80—Wrote 69 Congressmen, who had expressed an interest in the CNI proposal, about the status of the reconstituted milk deliberations and enclosed a background paper on the issue.

y. A meeting of representatives from several Departmental agencies was held to discuss another draft of the impact statement on reconstituted milk.

z. 2/5/80-10/21/80—During this period, an additional 174 letters were sent to Senators and Congressmen who had expressed interest in the reconstituted milk issue.

aa. 2/14/80—Completed an update on the reconstituted milk issue that was mailed to a list of known consumer organizations and others. The development of the paper was initiated at the 1/21/80 meeting and various drafts were reviewed by Department officials prior to mailing.

bb. 2/14/80—Completed a review of material used to develop the table (Table 6) on State regulations that apply to reconstituted fluid milk products. Table 6 is contained in Station Bulletin 529, *Potential Impacts of Reconstituted Milk on Regional Prices, Utilization and Production*, authored by Hammond, Buxton and Thraen.

cc. 2/29/80—Department personnel completed a review of another draft of the impact statement.

dd. 3/4/80—A meeting of major Department officials was held to review the status and partial findings of the impact analysis on reconstituted milk and to discuss legal questions.

ee. 3/11/80—Completed and forwarded answers to questions for the record by Mr.McHugh, House of Representatives Agricultural Subcommittee. Five of seven questions pertained to the reconstituted milk issue.

ff. 4/14/80—Completed for Departmental use a summary of views filed by interested parties in response to the prenotice of hearing. At the time the summary was made, about 7,600 letters had been received from the public. Letters received after this date were reviewed, categorized, and filed but were not summarized as the views expressed were already well represented.

gg. 5/6/80—A meeting of major Department officials and officials from other Governmental units was held to discuss the reconstituted milk issue and the tentative findings of the impact analysis. It was decided that further analytical work on the issue should be undertaken before deciding whether a hearing should be held on the CNI proposal.

hh. 5/7/80-11/6/80—Several additional drafts of the impact statement on reconstituted milk were developed, and reviewed by Department officials.

ii. 11/7/80—Issued a request for public comments on a preliminary impact statement on proposed amendments to all federal orders. The impact statement was published in the Federal Register (45 FR 75956). The statement analyzed the potential impact of the CNI proposal and several other alternatives. The public was invited to submit comments on the impact statement as well as to submit alternative proposals or modifications to the CNI proposal that would mitigate any adverse economic impacts of the CNI proposal. Comments were to be filed by 1/2/81. (Attachment E to the Complaint).

The impact statement was mailed to all market administrators for subsequent distribution in accordance with the interested parties list for each federal order markct. The

impact statement was also mailed to 50 governors, approximately 600 individuals associated with the proposed Alabama and Boise area federal orders, approximately 260 interested parties on an updated consumer organization list, and about 100 interested parties associated with State and local governments that responded to the pre-notice of hearing.

jj. 11/14/80—Sent letters informing 189 concerned Senators and Congressmen of the issuance of the preliminary impact statement.

kk. 12/2/80—Began receiving, reviewing, categorizing and filing views submitted by the public in response to the preliminary impact statement. As of 2/16/81, approximately 484 comments had been received from the public.

ll. 12/22/80—Completed and issued a notice extending the time for the filing of comments on the impact statement to 2/16/81. The same notification procedure that was used for the impact statement was utilized. (Attachment A).

9. a. The Department's preliminary impact statement sets forth the potential economic impact on consumers, dairy farmers, and the federal government that is considered likely to result from the plaintiffs' proposal to change the regulatory treatment of reconstituted milk under all federal milk marketing orders. The impact analysis is based on marketing data for the year 1978.

b. Under plaintiffs' proposal, the cost of reconstituted milk would be the price for milk in manufacturing uses—Class III (or Class II in a two-class market)—plus the cost of drying fresh milk and reconstituting the milk powder back into fluid milk. Assuming that reconstituted milk blended with fresh fluid milk is made available to consumers at a lower price than fresh fluid milk, the study projects that within three years such product would account for up to 38 percent of the fluid milk consumption in the United States. Most sales of reconstituted milk would displace sales of locally produced fresh fluid milk, which local milk would then be directed into manufacturing uses with a corresponding reduction in the price received by farmers. In addition, it is likely that some locally produced milk would be diverted into powder manufacturing solely to permit it

to be reclassified in a lower priced class under an order and thereafter sold locally as reconstituted fluid milk.

c. On a national basis, the study indicates that the shift to reconstituted milk could result in a yearly reduction in cash farm receipts for dairy farmers of up to $520 million. However, the total projected social benefits of the proposed change in pricing would amount to only $351 million (a decrease of $186 million in consumer expenditures for fluid milk and a decrease of $165 million in government expenditures for dairy product purchases under the dairy price support programs, all as a result of the reduction in price), and thus, would not completely offset the reduction of farm receipts.

d. The projected economic impacts for each of nine regions in the United States identified in the study vary widely with the greatest impacts being felt in the Northeast and Southern areas of the country. Projected cash farm receipts from milk would decline by nearly 14 percent in the Southeast region and by 6 percent in the South Central region. In the Northeast region, the decline for dairy farmers would be 7 percent, or $247 million annually. This reduction in farm income would be accompanied by a moderate decline in nationwide milk production of approximately .64 percent, with the greatest reductions being felt, again, in the Northeast (1.46 percent decline) and the Southeast (1.77 percent decline) regions. The unequal impact on dairy farm income would also, in all probability, result in some geographic realignment of milk production in the United States.

e. Other impacts which could also be expected to flow from the adoption of the proposed amendments are: (1) A reduction in the non-fat solids content of milk (reconstituted and blended milk) from the naturally occurring level of approximately 8.6 percent to the legal required minimum of 8.25 percent, which would be the result of fluid milk processors desiring to minimize the cost of producing reconstituted milk for fluid consumption; (2) an increase in the cost of administering milk orders, due to the resultant increase in reporting and verification activities that would be required to monitor compliance; and (3) a

possible increase in dairy support prices to offset the reduced farm income and to stabilize geographic areas of milk production (farmers would be expected to press hard for such an increase) with a resultant increase in prices to consumers for most manufactured dairy products (i.e., products other than those in Class I).

f. The effects on the dairy industry reflected in the preliminary impact statement are highly significant and require that the Secretary give the proposed amendments the most critical examination practical in light of the objectives of the AMAA, before initiating the costly and time consuming process of rulemaking with regard to the proposed amendments.

10. a. Since the close of the comment period of February 16, 1981, the Department has been reviewing the comments received in response to the impact statement. When this process is completed and taking into consideration all of the data generated since the proposal was submitted by plaintiffs (through public participation and the Department's own analysis), a decision will be made as to whether or not the proposed amendments, if adopted, will tend to effectuate the declared policy of the AMAA.

b. If it is determined that the proposed amendments will not tend to effectuate the policy of the AMAA, the proposal will be denied and the plaintiffs will be notified of the reasons therefor, as provided in section 900.3 of the rules of practice (7 CFR 900.3), and that will end the proceeding; however, under this circumstance the plaintiffs, as well as any other interested parties, are free to rethink their position and to submit a different or a modified version of their proposal for the Department's consideration.

c. Alternatively, if it is determined that the proposed amendments would tend to effectuate the policy of the AMAA, the Department will issue a hearing notice on the proposal and any other proposals that may have been received during the investigation period, which are determined to be consistent with the policy of the AMAA. The procedures set forth in 7 CFR 900.4-900.18 will then control the progress of the formal rulemaking process which is required for the issuance of or amendment to federal milk

marketing orders. Thus, hearings would be held and plaintiffs would be required to present evidence, under oath and subject to cross examination by any hearing participant, in support of the proposed amendments. In addition, other participants, including any additional proponents and any opponents of the changes, would similarly present their evidence. Based on the hearing record thus produced (i.e., the hearing testimony and any exhibits as well as any proposed findings and briefs submitted by interested parties) the Department would first prepare and issue a recommended decision, which would be published and otherwise made available for public comment. Thereafter, at the close of the comment period the Department would issue a final decision. If the final determination is to reject the proposed amendments the proceeding would be terminated at that point. However, if any amendments are adopted, they would not become effective until after being approved by producers in referendums held in each of the 47 marketing order areas.

11. Finally, with regard to the availability of milk powder for reconstitution by consumers, milk powder, made from milk accounted for by handlers at Class II (or Class III) prices under the orders, is presently, and has been for the last 30 years, readily available at retail levels. Interested consumers may purchase such powder and reconstitute it by adding water. In addition, by blending this reconstituted milk with fresh milk in equal portions it can be made indistinguishable from the fresh milk. Finally, the cost to the consumer of this home reconstituted milk is likely to be less than the cost of commercially reconstituted milk in all cases because the consumer avoids having to pay the handlers' costs associated with reconstituting, packaging, and marketing the fluid product.

/s/ Herbert L. Forest
HERBERT L. FOREST
Director, Dairy Division
Agricultural Marketing Service
United States Department of Agriculture

Subscribed and sworn to before me
this 18th day of March 1981.

/s/ Sue E. Toms

SUE E. TOMS
Notary Public

My commission expires on January 31, 1982.

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
WASHINGTON, D.C. 20250

April 7, 1981

Ms. Ellen Haas and Mr. Thomas B. Smith
Community Nutrition Institute
1146 19th Street, N.W.
Washington, D.C. 20036

Dear Ms. Haas and Mr. Smith:

This is in further response to the petition on reconstituted milk that you submitted to the Department on behalf of the Community Nutrition Institute, a fluid milk distributor, and three consumers. Petitioners ask that all Federal Milk orders be amended to "eliminate the restrictive pricing provisions" pertaining to reconstituted fluid milk products.

After an extensive analysis of the petition, we have concluded that a public hearing should not be held to consider amending the orders in the manner sought by petitioners. Basically, the analysis indicates that the proposed order changes would lead to substantial financial losses to dairy farmers while providing negligible benefits to consumers. It is our belief that the proposal, if adopted, would not tend to effectuate the declared purposes of the Agricultural Marketing Agreement Act of 1937, as amended, which is the statutory authority for milk orders.

We have reached this conclusion after a careful and thorough review of the issues presented by the proposal. It became evident, after our early review of the petition, that the impacts of the proposed order changes were potentially far-reaching and significant. The Department, therefore, took steps to assure itself that the many ramifications of the proposal had been fully considered. The Department's review of the petition included two major efforts. First, the public was invited to submit comments on the reconstituted milk proposal and on whether the proposal was an appropriate subject for a public hearing. Second, a comprehensive preliminary economic impact statement was developed

and submitted to the public for comment. In both cases, we received numerous responses from a broad cross-section of the dairy industry, state governments, and consumer groups.

From our analysis of the proposal and the some 9,000 public comments on the proposal and the preliminary impact statement, we find that there are a number of significant reasons why the reconstituted milk proposal would be inconsistent with the intent of the Act. We particularly note the following bases for our finding:

1. *Adoption of the reconstituted milk proposal would make meaningless the classified pricing of milk and thus thwart the intent of the Congress.*

The Agricultural Marketing Agreement Act of 1937, the legislation for milk orders, provides for the classification of milk according to its use and for the setting of minimum prices for each class. Prices are to be uniform among all handlers in the regulated market. 7 U.S.C. 608c(5)(A)

The proposal by CNI and others would eliminate the "down-allocation" of nonfat dry milk used in reconstituted milk and the "compensatory payment" on any reconstituted milk assigned to Class I uses. The thrust of the proposal is to reclassify commercially processed reconstituted milk in the lowest price class of each order. When processed for drinking purposes, reconstituted milk is now classified as Class I milk along with other milk products processed for fluid consumption.

The projected effect of the proposal would be that in many of the Federal order markets—primarily those in the South and East where Class I prices are the highest—reconstituted milk would be priced to handlers at a lower price than other milk in fluid uses. In these markets, there would be a strong economic incentive for handlers to substitute reconstituted milk for other fluid milk (or "fresh" milk) to the extent consumers would accept the product. A blend of reconstituted milk and fresh milk could be expected to make major inroads on the current sales of fresh milk in the southern and eastern markets.

In markets where some fluid products are being made from fresh milk and others from lower-priced reconstituted

milk, there would not be uniform prices among handlers for milk being sold for fluid consumption. Handlers using fresh milk would not be able to compete on an equitable basis with handlers using reconstituted milk. To stay competitive, they would be forced to reduce their purchases of fresh milk and instead turn to the processing of reconstituted milk. Producers losing their fluid milk outlets then would have to channel their supplies to lower-valued manufacturing uses.

It was for these reasons that the current classification and pricing of reconstituted milk were adopted. Such regulations were established and later reaffirmed on the basis of extensive deliberations by the dairy industry, academicians, and the Government in formal rulemaking proceedings. The provisions were widely supported as a reasonable means of providing uniform classification and pricing among handlers.

When Congress enacted legislation authorizing milk orders, it specifically authorized classified pricing because earlier experience had demonstrated that such pricing could ameliorate the disorder and unstable conditions that exist in fluid milk markets in the absence of classified pricing. If milk orders were to classify and price reconstituted fluid milk products other than as Class I, the result would be a disregard for the basic purposes underlying classified pricing. Under this circumstance, the regulatory objectives intended by Congress would not be carried out.

2. *The competitive problems that would result from the reconstituted milk proposal would lead to pressures to lower Class I prices for fresh milk, which would precipitate major changes in the dairy industry.*

The petition of CNI and others does not propose the lowering of Class I prices. However, if reconstituted milk were reclassified in a lower class, handlers in the southern and eastern markets who prefer to use fresh milk would be forced from economic pressures to shift to reconstituted milk to remain competitive. These handlers could do this by purchasing powder or, as would be more likely, separating and drying milk and then reconstituting it. This waste of energy and non-uniformity in pricing would generate con-

siderable pressures for lower Class I prices for fresh milk so that fluid milk products could continue to be made from fresh milk and be competitive with reconstituted milk. If the Class I prices were not lowered at the outset, it is reasonable to assume that this eventually would have to occur.

The Department's preliminary impact statement sets forth the extent to which "prevailing" Class I prices would have to be lowered to meet the competition from reconstituted milk if the CNI proposal were adopted. The estimated price declines were $1.48 per hundredweight (13 cents per gallon) in the Southeast, and $1.12 per hundredweight (10 cents per gallon) in the South Central region. While the analysis was based on 1978 data, we believe the impact statement nevertheless is useful in portraying the general impacts that might be expected.

A substantial decline in Class I prices would result in a major drop in returns to producers. Nationally, annual cash receipts from milk marketings could drop an estimated $576 million (based on 1978 marketing data). Farm prices could drop about 41 cents per hundredweight. Dairy farmers in the East and South would be adversely affected the most. Farm prices could drop about 71 cents per hundredweight in the Northeast, about 75 cents in the South Central region, and about $1.47 in the Southeast.

The greatest total income loss to dairy farmers would be in the Northeast, and would amount to about $264 million a year. The application of an income multiplier would substantially increase the economic loss to rural communities in that area.

We believe that adopting provisions in milk orders that can result in changes of this magnitude goes far beyond the intent of Congress when it authorized milk orders. The orders were established as a means of helping dairy farmers, not putting them out of business. The reconstituted milk proposal, which is supposed to benefit consumers, could set in motion economic forces that could severely alter an industry that has provided the public with an adequate supply of high-quality milk at reasonable prices, as Congress intended. There is no indication that the limited benefits

that would accrue to consumers could justify such a radical change in the dairy industry.

We recognize that milk orders may tend to foster certain production and marketing patterns that might not otherwise exist in an unregulated setting. It might well be, for example, that there would have been less milk production in the southern and eastern markets over the years in the absence of regulation. However, there has been no indication that our society has found this development to be an undesirable result of marketing orders. The order program is a marketing arrangement that Congress continues to sanction, and one that it obviously considers to be operating in the public interest. If milk orders are to be used to effectuate changes in the national marketing structure in the magnitude noted above, it would appear that the proper avenue for determining if such changes are desirable would be the legislative process, not the administrative route.

3. *Adoption of the reconstituted milk proposal would result in negligible benefits to consumers.*

Nationally, per capita savings to consumers from lower prices for reconstituted milk would be relatively limited (about 82 cents per capita annually). Moreover, consumers could experience higher prices for various manufactured dairy products, including milk powder sold in stores for reconstituting in the home. This could stem from a stronger demand for milk powder for commercial reconstitution as well as possible price support increases for manufacturing milk that might be considered necessary to offset some of the expected decline in dairy farmer income.

Total savings for consumers and the Federal Government would be considerably less than the projected loss in income for dairy farmers. Based on 1978 data, it was estimated that after operating for 3 years under the proposal, the order changes, on an annual basis, would (1) reduce consumer expenditures by $186 million, (2) reduce Government Commodity Credit Corporation purchases by $165 million, and (3) reduce cash receipts to dairy farmers by $520 million.

4. *Consumers already have a lower-cost alternative to fresh milk.*

Consumers may buy nonfat dry milk at grocery stores and reconstitute skim milk by adding water to the powder at home. Also, they can easily blend this reconstituted product with fresh whole milk if they prefer a product with some butterfat in it. Milk reconstituted at home would continue to be cheaper than commercially reconstituted milk under the CNI proposal because of the added costs of labor, packaging, refrigeration, and distribution.

5. *The public would not be assured of having a commercially reconstituted milk product that is as nutritious as fresh milk.*

With the economic advantage that reconstituted milk would have over fresh milk under the CNI proposal, handlers would be expected to reduce the nonfat solids content of fluid milk products to the legally permitted minimum level. In most states, the product standards require a minimum of 8.25 percent nonfat solids in milk, which is considerably lower than the approximte 8.75 percent nonfat solids level found in packaged whole milk. Thus, in making a reconstituted product, handlers presumably would add no more powder to water than would be necessary to meet the minimum nonfat solids level. In making fluid milk products from fresh milk, handlers could dilute the solids level of the milk by blending in reconstituted milk containing less than the minimum solids. The nutrient value of milk could then decline and consumers probably would pay more than they do now for the same nutrition from fluid milk products.

With respect to another facet of the petition, we note that petitioners raise several legal considerations that cannot be resolved in a rulemaking proceeding. In the petition, it is contended that the "current market order provisions exceed the scope of the Secretary's authority under the Agricultural Marketing Agreement Act." In this regard, petitioners make the following claims:

(1) The restrictive pricing provisions are unnecessary to protect milk producers.

(2) These provision are contrary to the policy of the Act to protect against unreasonable fluctuations in supplies and prices.

(3) The provisions create a barrier to the marketing of nonfat dry milk in violation of the Act.

(4) The Secretary has no authority to regulate the price of milk substitutes made from powdered milk or whey.

Claims that the present regulatory treatment of reconstituted milk is not in accordance with law must be resolved through procedures other than public hearings. These claims are at issue in the lawsuit initiated by the petitioners in the United States District Court for the District of Columbia (*Community Nutrition Institute* v. *Block*, No. 80-377 (D.D.C.)). Accordingly, in reviewing the petition for rulemaking purposes, we have not directed our attention to these claims of the petitioners.

For the reasons set forth above, the proposal submitted by the Community Nutrition Institute and others is denied.

Sincerely,

/s/ William T. Manley
WILLIAM T. MANLEY
Deputy Administrator
Marketing Program Operations

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3077

COMMUNITY NUTRITION INSTITUTE, ET AL., PLAINTIFFS,

v.

JOHN R. BLOCK, ET AL., DEFENDANTS.

AFFIDAVIT OF THOMAS B. SMITH

City of Washington)
) ss:
District of Columbia)

Thomas B. Smith, being duly sworn, deposes and says:

1. The statements in this affidavit are either based upon my personal knowledge or upon figures obtained from records of the United States Department of Agriculture and its publications. I am making this statement in support of the plaintiffs' cross-motion for summary judgment and in opposition to defendants' motions to dismiss or, in the alternative, for summary judgment.

2. I am an economist employed by the Community Nutrition Institute ("CNI") in Washington, D.C. I have worked for CNI since 1977. Since that time, I have worked on numerous projects involving the regulation of milk and have developed a thorough understanding of the Federal milk marketing order system.

3. I received a Bachelor of Arts degree, Magna Cum Laude, in economics from Dickinson College, Carlisle, Pennsylvania in 1976.

4. CNI is a nonprofit charitable organization specializing in food and nutrition issues and is primarily concerned with the development, adoption and implementation of a national food policy which serves the health and economic needs of consumers, particularly low income consumers. CNI has designed and participated in "Buying Skills Programs" and "Nutrition Education Programs" dedicated to educating low income consumers of the various alternative sources of

low-cost nutritional food. CNI also works with various state and local anti-hunger and nutrition assistance programs in educating the programs' low income recipients on the various alternative sources of low-cost nutritional food. CNI, as an association, has a substantial interest in providing the greatest possible amount of information concerning low cost sources of nutritional food.

5. In February of 1980, I called the Office of the Hearing Clerk at the Department of Agriculture to make arrangements to review the records compiled by the Secretary during hearings on reconstituted milk and other issues. I spoke with Cheryl Scoville and asked to review the following hearing records: AO-219-A21, AO-293-A7, AO-271-A7, AO-271-A12, AO-213-A21, AO-361-A3, AO-366-A8, and AO-219-A12. Ms. Scoville informed me that some of the records were available in the hearing clerk's office, but that others would have to be obtained from the Department's record file in Suitland, Maryland. She asked if it was necessary to produce the entire record of each hearing and asked if I could limit my request to specific hearings or parts of each hearing transcript. I responded that I did not know which parts of the transcript covered the issues I was interested in and therefore I would need to see the full transcript of each hearing. She agreed to order the records I had requested, but said it would take several days or longer.

6. After the records arrived, I spent several partial days at the hearing clerk's office in the Department of Agriculture reviewing different parts of these records and took notes on those records in which reconstituted or filled milk regulation was discussed. In sum, I spent approximately 16 hours reviewing these records.

7. From my search through these transcripts I found that the hearing format permitted any hearing attendee to question witnesses. Consequently large parts of the hearing transcripts were repetitive and extraneous to the CNI petition on reconstituted milk.

8. I would characterize those parts of the record I reviewed as consisting primarily of conclusory statements by dairy industry representatives, including cooperatives,

handler trade associations, and academicians. In the records I reviewed I did not find any independent economic or market impact evaluation by the Department of Agriculture supporting the need for the regulations on reconstituted and filled milk. With the exception of a study submitted by the Milk Industry Foundation, I found virtually no economic evaluation of any kind.

9. Down allocation provisions and the imposition of a compensatory payment equal to the difference between the Class I and Class II rates on reconstituted milk makes it uneconomic for handlers to produce and market reconstituted milk products. In those order areas I have studied, the addition of the compensatory payment drives the price of reconstituted milk to the handler higher than the price the handler must pay for fresh skim milk.

10. A number of factors determine the cost of producing a reconstituted milk product. First, there is the cost of the milk powder, the primary ingredient. The market price of powder is generally determined by the current support price the Federal government will pay for powder. Since the Federal government is an ever-available customer for powder at the support price, as a practical matter, powder will usually not be sold for less than the support price on the open market. A second factor is the cost of transporting the powder from the area where it is produced to the area where the reconstituted milk product is manufactured. The third component is the cost associated with warehousing the milk powder and processing it into a reconstituted milk product. The final component is the compensatory payment imposed by the Milk Market Orders. This payment is the difference between the Class I and Class II (or Class III) prices within the order area.

11. Using the March, 1981, Federal support price for milk powder of approximately 94 cents per pound, I computed the approximate cost of producing reconstituted milk product in various order areas in the United States. To compute the total costs to the manufacturer, I multiplied $.94 by 8.5, which is the approximate number of pounds of milk powder in 100 pounds of reconstituted milk. I then added 5 cents for warehousing, handling and processing. I

also included a charge for transportation based on the cost of shipping milk powder from Chicago, Illinois to the order area. (The transportation, warehousing and processing costs were taken from a 1979 study *Potential Impacts of Reconstituted Milk on Regional Prices, Utilization, and Production* by Hammond, Buxton and Thraen published by the Agricultural Experiment Station, University of Minnesota, in cooperation with the Economics, Statistics and Cooperatives Service of the U.S. Department of Agriculture). Finally, I added the compensatory payment.

12. I computed the price of manufacturing reconstituted milk product in the following example marketing order areas: St. Louis/Ozarks, New England, Ohio Valley, and Chicago Regional. In each instance, the compensatory payment drove the cost of the reconstituted milk higher than the Class I price for fluid milk in the order area. In the St. Louis/Ozarks order area, the total cost of 100 pounds of reconstituted milk would be approximately $9.73, compared to the announced cooperative Class I price equivalent for skim milk of $9.10. (This price includes "over-order premiums" charged by dairy cooperatives and is reduced by the butterfat differential of 16.9 cents per .1 percent x 3.5 percent butterfat.) In New England, the final cost of reconstituted milk would be approximately $11.14 per 100 pounds, compared to the announced cooperative Class I skim milk price of $9.89. For the Ohio Valley order area, the cost of manufacturing 100 pounds of reconstituted milk would be $9.83, compared to $9.12 for Class I skim milk. In the Chicago Regional order area, the cost of reconstituted milk would be $9.27, compared to $8.73 for Class I skim milk.

13. In each of these cases, without the compensatory payment the cost of the reconstituted milk product would have been lower than the announced cooperative Class I price for fresh fluid skim milk. The compensatory payment for each of the areas was: St. Louis/Ozarks—$1.57; New England—$2.94; Ohio Valley—$1.67; and Chicago—$1.23. (In Chicago, the reconstituted milk product would be more expensive than fresh skim milk if milk cooperatives there reduced the size of their "over-order premiums" by 50 percent or more.)

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on May 1, 1981.

/s/ Thomas B. Smith
THOMAS B. SMITH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3077

COMMUNITY NUTRITION INSTITUTE, ET AL., PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY OF THE
UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS,

and

NATIONAL MILK PRODUCERS FEDERATION,
ASSOCIATED MILK PRODUCERS, INC., AND
CENTRAL MILK PRODUCERS COOPERATIVE,
INTERVENOR-DEFENDANTS.

AFFIDAVIT OF JAMES R. BOX

Cook County

State of Illinois

JAMES R. BOX, being duly sworn, deposes and says:

1. I have been employed as Director of Marketing, Associated Milk Producers, Inc. (AMPI), Mid-States Region, Chicago, Illinois since July, 1977. This affidavit is made in support of the motion of intervenor-defendants National Milk Producers Federation, Associated Milk Producers, Inc. and Central Milk Producers Cooperative to dismiss or, in the alternative, for summary judgment and in opposition to the plaintiffs' cross-motion for summary judgment.

2. I received a Bachelor of Science degree in economics from Auburn University, Auburn, Alabama in 1967 and a Master of Science degree in economics from Auburn in 1968.

3. Following completion of my academic training, I was employed as a marketing specialist trainee by the office of the Milk Market Administrator, Order No. 30, Chicago Regional Marketing Area where I remained for approximately one year. Following a year of training in the Order 30 Mar-

ket Administrator's office, I transferred to the Dairy Division, Agricultural Marketing Service, United States Department of Agriculture, Washington, D.C. where I was employed as an economist in the Dairy Division's Order Formulation Branch.

4. My duties in the Order Formulation Branch of the Dairy Division included review of Federal milk order promulgation and order amendment hearing records, analysis of the hearing record evidence, preparation of findings and conclusions relating to proposed amendments, and participation in the formulation of new or amended milk orders.

5. After working for three years in the Order Formulation Branch of the Dairy Division, I returned in 1972 to the Order 30 Market Administrator's Office in Chicago, Illinois where I was employed as a dairy economist. My employment required that I become completely familiar with: (1) the compilation and analysis of the Order 30 Market Order statistics which are routinely published by the Agricultural Marketing Service, Dairy Division; (2) the operative provisions of the Federal milk orders; (3) the system of butterfat and skim accounting that is used in computing milk handlers' pool obligations under Federal milk orders; and (4) the several systems and techniques used by Market Administrators to audit or verify the "use value" of the milk or milk products received by regulated milk handlers.

6. I terminated my employment with the Order 30 Market Administrator's Office in July, 1977, when I accepted the position of Director of Marketing for AMPI Mid-States Region. The Mid-States Region encompasses Indiana, Illinois, Wisconsin, and a portion of Michigan. Within that Region AMPI markets milk to handlers regulated by Chicago Regional Order No. 30, Indiana Order No. 49, Central Illinois Order No. 50, Southern Illinois Order No. 32, Michigan Upper Peninsula Order No. 44, St. Louis-Ozarks Order No. 62, Louisville-Lexington-Evansville Order No. 46, Ohio Valley Order No. 33 and Iowa Order No. 79.

7. During the course of my employment, both in the Order 30 Market Administrator's office and with AMPI, I have become familiar with the terms upon which handlers purchase milk from cooperatives or independent producers

in AMPI's Mid-States Region and in other areas of the country. In the midwest and northeastern part of the United States there is no Federal order area where only a single cooperative supplies all of the milk received by regulated handlers. For that reason there is no single ascertainable Class price for milk in any such Federal order area except the monthly Class prices announced by the Federal milk market administrator in the area.

8. In those areas of the midwest where handlers are supplied by a dominant cooperative, the cooperative's published price announcement does not specify or announce a "cooperative Class I price . . . for skim milk" nor may such a price be determined from the cooperative's announced Class I price for whole milk.

9. Regulations governing the production and distribution of fluid milk require, almost without exception, that all such fluid milk products, including reconstituted milk, be produced from a Grade A milk supply. There are standards and regulations governing the production and handling of Grade A non-fat dry milk powder which include the requirement that such powder is produced only from Grade A raw milk.

10. The market price of Grade A milk powder cannot be ascertained from the current, minimum support price for milk powder as announced by the Commodity Credit Corporation. Milk powder purchased under the Federal support program is not required to be Grade A. The market price for Grade A powder is reported weekly by the United States Department of Agriculture, Federal-State Market News Service.

11. Approximately 8.7 pounds of non-fat dry milk powder may be extracted from the 96.5 pounds of skim milk contained in 100 pounds of 3.5 percent butterfat whole milk. To make 100 pounds of reconstituted milk requires 9 pounds of non-fat dry milk powder.

12. Attached hereto as Exhibit A and made a part hereof is a comparison of the minimum Federal order Class I skim value, for the indicated Federal milk orders with the ingredient cost of 100 pounds of reconstituted Grade A skim milk based upon published price data for March, 1981.

13. The information and statements in this affidavit are based upon my personal knowledge or upon data published by or under the direction of the United States Department of Agriculture.

14. I declare under penalty of perjury that the foregoing is true and correct.

/s/ James R. Box
JAMES R. BOX

Dated: MAY 27, 1981

EXHIBIT A

COMPARISON OF CLASS I SKIM VALUE PER CWT. AT MINIMUM FEDERAL ORDER PRICE WITH INGREDIENT COST OF 100 POUNDS RECONSTITUTED GRADE A SKIM MILK FOR FOUR ORDERS, MARCH 1981

Federal Orders	Order Class I Skim Value	Price Per Lb. Grade A NFDM[1]	Reconstit. NFDM Value Per Cwt.[2]	Amount Class I Order Skim Exceeds (+) Or Is Less (−) Per Cwt. Than Reconstituted NFDM	Dollars Per Gal. Diff.[3]
Chicago Regional	$7.99	.96	$8.64	−.65	−.056
St. Louis-Ozarks	$8.33	.96	$8.64	−.31	−.027
Ohio Valley	$8.42	.99	$8.91	−.49	−.042
New England	$9.65	.99	$8.91	+.74	+.064

[1] Source, *Dairy Market News*, Regional Report, U.S.D.A. Federal-State Market News Service, Grade A Non-Fat Dry Milk Power (NFDM).

[2] Assumes 9.00 pounds NFDM yields 100 pounds of skim milk. No labor or processing costs included.

[3] Amount Federal Order Class I skim value exceeds (+) or is less than (−) reconstituted NFDM Value divided by 11.6 (gallons skim per cwt.).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3077

COMMUNITY NUTRITION INSTITUTE, ET AL., PLAINTIFFS,

v.

JOHN R. BLOCK, ET AL., DEFENDANTS.

AFFIDAVIT OF JOSEPH J. OBERWEIS

City of Aurora)
) ss:
State of Illinois)

Joseph J. Oberweis, being duly sworn, deposes and says:

1. The statements in this affidavit are either based on my personal knowledge and experience or upon figures obtained from records of the United States Department of Agriculture and its publications. I am making this statement in support of the plaintiffs' cross-motion for summary judgment and in opposition to the Federal defendants' and intervenor-defendants' motions to dismiss, or in the alternative, for summary judgment.

2. I am Chairman of Oberweis Dairy, an Aurora, Illinois milk processing concern founded by my father and which is now approximately 55 years old. Oberweis Dairy is considered a regulated milk handler operating under Federal Milk Marketing Order Number 30.

3. I have been a milk handler for 51 years, during which time I have witnessed the birth and development of Federal Milk Marketing orders and the consolidation of market power by the dominant milk producer cooperatives operating in what is now Order Number 30.

4. For handlers operating under Federal Milk Marketing orders, including Order Number 30, "over order" premiums, or surcharges, constitute an important part of the total price routinely charged by dairy cooperatives selling grade A milk for Class I uses. It is unrealistic and misleading to characterize the Federal Class I price (as set by the

Marketing orders) as the cost of Class I milk for the handler, because substantial over order surcharges are regularly added to that price by producer cooperatives, thus effectively raising the cost to handlers.

5. In April, 1981 Central Milk Producers Cooperative, of which Associated Milk Producers, Inc., is a member, offered to sell Oberweis Dairy milk from receiving plants for \$1.22 per cwt. over Federal Order price, not including transportation. I was able to purchase substantial supplies for about \$1.15 per cwt. over the Order price.

6. The down-allocation and compensatory payments provisions of the Federal Milk Marketing orders protect the local cooperatives from competition from reconstituted milk products, thereby enhancing the ability of large dairy cooperatives to charge sizable over order surcharges. Absent the compensatory payment, I could manufacture reconstituted milk for less than the price I pay for Class I milk.

7. In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ Joseph J. Oberweis
JOSEPH J. OBERWEIS

Dated: JUNE 3, 1981

Subscribed and sworn to before me
this third day of June, 1981.

/s/ Marie Oberweis
MARIE OBERWEIS, Notary Public
Kane County, Illinois

My commision expires 12/19/84.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3077

COMMUNITY NUTRITION INSTITUTE, ET AL., PLAINTIFFS,

v.

JOHN R. BLOCK, ET AL., DEFENDANTS.

SUPPLEMENTAL AFFIDAVIT OF THOMAS B. SMITH

City of Washington)
) ss:
District of Columbia)

Thomas B. Smith, being duly sworn, deposes and says:

1. The statements in this affidavit are either based on my personal knowledge and experience, figures obtained from records and publications of the U.S. Dpeartment of Agriculture, or formal submissions made to the Department by other Federal agencies and private firms in the industry. I am making this statement in support of Plaintiffs' Reply to Defendants' Opposition To Plaintiffs' Cross-Motion For Summary Judgment. The statement supplements my affidavit of May 1, 1981, submitted in the above-referenced action (hereinafter "First Smith Affidavit").

2. Warehousing, processing, and transportation costs included in the First Smith Affidavit were either drawn directly or computed from data presented in a 1979 USDA-supported study. (*Potential Impacts of Reconstituted Milk on Regional Prices, Utilization, and Production*, Jerome W. Hammond, Boyd M. Buxton, Cameron S. Thraen, 1979, pages 7-10). The study was conducted by three researchers, one a USDA employee, at the University of Minnesota Agricultural Experiment Station in cooperation with the USDA Economics, Statistics and Cooperatives Service.

3. The market price for Grade A milk powder is reported weekly by the USDA Federal-State Market News Service publication, *Dairy Market News*, and this publication provided substantiation for the \$.94 per pound figure (the Federal purchase price for milk powder) used as the cost of

powder in the computations in the First Smith Affidavit. In report Number 11, Volume 48, the Market News Service stated that, "Sales of NDM in the Chicago area are slow . . . offerings of Powder are ample." Prices quoted ranged from $.9325 per pound and $.9600 per pound. (Page 4). However, in the Eastern and Southern Markets, the Service reported that "more plants are offering lower prices, to the trade, for milk powder as they try to keep inventories low. Many reports indicate offerings as low as .9100 FOB were not uncommon". (Page 6).

4. The minimum quantity of milk solids not fat that would be permitted in 100 pounds of reconstituted milk product is 8.25 pounds. Since milk powder is 3 percent moisture and .8 percent butterfat (the remainder is milk solids not fat) approximately 8.5 pounds of milk powder would be required to supply the minimum amount of milk solids not fat to a reconstituted product. 9 pounds would be used if a greater concentration of milk solids not fat were desired.

5. The effective Class I skim milk prices, to which the cost of manufacturing reconstituted milk products were compared in the First Smith Affidavit, were computed from data contained in a table in the USDA Federal-State Dairy Market News Service publication *Dairy Market News* (Volume No. 48, Report No. 14, April 6-10, 1981, page 11) entitled "Minimum Federal Order and Announced Cooperative Class I Prices in Selected Cities." As set forth in the First Smith Affidavit "the announced cooperative Class I price *equivalent*" (emphasis added) was computed by adding the over-order premiums charged by cooperatives to the Federal order Class I prices (or simply using the announced cooperative Class I prices included in the table) and then subtracting an amount for the butterfat which is removed from the whole milk (assumed to be 3.5 percent butterfat) to make skim milk. (Whether cooperatives or handlers remove the fat is immaterial; the prices used for purposes of comparison clearly reflect the value of the skim milk purchased in the areas and used for Class I purposes.)

6. The Federal-State Market News Service publication indicates that over-order premiums are announced and reg-

ularly added to the Federally-established Class I prices. As a footnote explanation of its table of prices, the Service says that

> "This table contains such information as can readily be obtained as to over-order Class I prices announced for the beginning of the month by cooperative associations in various markets ... These data are common market knowledge in the sense that the information represents basic Class I price announcements by the cooperatives sent to all handlers who buy milk from them..." (Page 11).

While the Market News Service also notes that such over-order prices have not been verified as actually being paid by handlers and that they may change or be adjusted during the month, the price quotes are clearly representative of the type of over-order prices handlers in individual cities would pay for raw milk to be used as Class I.

7. Over-order charges should be considered in the computation of the cost of fresh milk used in Class I so that a realistic price comparison to the cost of reconstituted products can be made. USDA itself has included the price impact of over-order charges in computing the cost of Class I milk as compared to the reconstituted product. In an October 12, 1979 memorandum from the Acting Director of the Dairy Division, W.H. Blanchard, to the Administrator of the Agricultural Marketing Service, Barbara Schlei, Mr. Blanchard, using the Southeastern Florida Market as an example, compares the cost of fresh skim milk to nonfat reconstituted milk and adds to the fresh skim milk Federal order price the over-order premium then being charged by cooperatives. Mr. Blanchard states, "In September, Southeastern Florida handlers paid cooperatives an 'over-order' Class I price of $15.60 for milk containing 3.5% butterfat. This was $1.56 per hundredweight above the minimum order price. The over-order Class I price translates to 90.2 cents per gallon of skim milk." Mr. Blanchard calculated the price of the reconstituted product as 67.8 cents per gallon. (Mr. Blanchard also includes a 5% per hundredweight cost of "processing" the reconstituted products in his calculation.)

8. In its comments to USDA on the CNI petition on reconstituted milk, the Milk Industry Foundations (MIF), a prominent dairy industry trade association counting both milk cooperatives and milk handlers among its members, also included the "over-order charge" in computing a handler's Class I price for fresh milk as compared to the price of manufacturing reconstituted milk. According to the MIF, "Another important factor to consider when comparing the cost of reconstituted and fresh milk is the market's over-order charge. During October of 1979 the over-order charge announced by the major cooperatives in the Chicago area was 89¢" per 100 pounds of milk in Class I (page 8). MIF concluded that in October, 1979 in Chicago, the ingredients in fresh Class I milk would have cost 26% per hundred weight or 2% a gallon more than the ingredients in reconstituted milk if down allocation or compensatory payments were not required.

9. Over-order charges should be included in the computations for comparing the prices of fluid milk and reconstituted milk. Were it not for the compensatory payment, reconstituted products could be manufactured for less than the effective cost to the handler of purchasing raw skim milk for Class I uses in most, if not all, milk market orders in the U.S.

10. There are market order areas in which the compensatory payment drives the cost of manufacturing reconstituted milk higher than the Federal order Class I price established by USDA.

11. Using the same assumptions and procedures as outlined in the First Smith Affidavit (¶¶ 10-11) I computed the price of manufacturing a reconstituted milk product with no butterfat in the following additional Federal milk marketing order areas: Central Arkansas, Texas, and Tampa Bay. In each instance, the compensatory payment drove the cost of the reconstituted product higher than both the Federal order Class I price for fluid skim milk and the cooperative over-order price in the order area. (For the Tampa Bay order area, however, no information on over-order charges could be obtained.) In the Central Arkansas order area, the total cost of manufacturing 100 pounds of reconstituted

milk (including the compensatory payment) would be approximately $10.11 compared to the Federal order Class I skim price of $8.68 and the announced cooperative over-order price of $9.36. In the Texas order area, the final cost of 100 pounds of reconstituted milk would be $10.61, compared to the Federal order Class I skim price of $9.05 and the announced cooperative over-order price of $9.54. In the Tampa Bay order area, the total regulated cost of 100 pounds of reconstituted milk would be approximately $11.13 as compared to the Federal order Class I skim price of $9.68. In each of these cases, without the compensatory payment the cost of the reconstituted product would have been lower than both the Federal order Class I price for skim milk and the announced cooperative over-order price for fresh skim milk. The compensatory payment for each of the areas was: Central Arkansas—$1.91; Texas $2.29; and Tampa Bay—$2.77.

12. In the preceding computation, for purposes of comparison to a nonfat reconstituted products, a fresh Class I skim price was computed by deducting the Federal order butterfat differential (16.9 cents per .1 percent x 3.5 percent butterfat) from the Federal order Class I price for whole milk in each market order area. Over-order prices were determined by deducting the same butterfat differential from the announced cooperative over-order prices for each order areas published in *Dairy Market News*. (Vol. No. 48, Report No. 14, April 6-10, page 11).

13. In some milk order areas, an elimination of the down allocation and compensatory payment requirements could limit the size of over-order charges significantly. In fact, in a "Briefing Paper on CNI's Reconstituted Milk Proposal" prepared by the AMS Dairy Division on December 18, 1979, it was stated that reconstituted milk "could put downward pressure on the present Federal order Class I prices and over-order prices in those markets where reconstituted products would have a price advantage over fresh milk". (Page 3).

14. According to the Department of Justice Antitrust Division, in a February 12, 1981 submission to USDA on the recently completed Impact Analysis on the CNI petition on

reconstituted milk, "current regulations ensure that any local or regional markets are substantially isolated from competition from other areas because fluid milk is expensive to transport over long distances . . . Consequently, local producers often can obtain a considerable premium from handlers over the Federal order minimum price for Class I milk. If local handlers could economically turn to reconstituted milk they would substantially undermine the potential market power of local producers and limit their ability to extract premium prices". (Page 6).

15. The curent down allocation and compensatory payment provisions of the Federal Milk Orders clearly make it uneconomic for handlers to produce and market reconstituted milk. This is especially true in the areas of the country where milk production is most expensive.

16. USDA itself has recognized this fact by stating in the November 17, 1980 preliminary Impact Statement on the CNI reconstituted milk petition (Fed. Reg. Vo. 45, No. 223, 11/17/80, page 75965) that "with no change in the pricing of reconstituted milk, handlers in most areas would continue to have a strong disincentive to use reconstituted milk rather than fresh milk in processing fluid milk products."

17. In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on June 4, 1981.

/s/ Thomas B. Smith
THOMAS B. SMITH

Supreme Court of the United States

No. 83-458

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS,

v.

COMMUNITY NUTRITION INSTITUTE, ET AL.

ORDER ALLOWING CERTIORARI. Filed November 28, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

No. 83-458

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, and UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners,

v.

COMMUNITY NUTRITION INSTITUTE, *et al.*,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. at 1a-44a)[1] is reported at 698 F.2d 1239. The opinion of the district court (Pet. App. at 53a-67a) is unreported.

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[1]References to Pet. App. are to the Petitioners' Appendices submitted to this Court.

JURISDICTION

The judgment of the court of appeals (Pet. App. at 45a-46a) was entered on January 21, 1983. A petition for rehearing was denied on April 19, 1983. (Pet. App. at 50a). On July 8, 1983, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 16, 1983. On October 13, 1983, the Clerk of this Court extended the time for filing an opposition to and including November 4, 1983. The jurisdiction of this Court is claimed under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq.*, are set forth in Pet. App. at 69a-95a.

STATEMENT

A. The Agricultural Marketing Agreement Act

This case concerns the right of consumers of fluid milk to challenge regulations issued under the Agricultural Marketing Agreement Act ("the AMAA" or "the Act"), 7 U.S.C. § 601 *et seq.*, that erect trade barriers to commercially manufactured reconstituted fluid milk products.[2] These regulations deprive respondents of a lower priced al-

[2]Although similar to reconstituted milk products made at home by consumers using nonfat dry milk, commerically reconstituted milk products are organoleptically superior because they more closely approximate the taste and consistency of fresh fluid milk. 45 Fed. Reg. 75,960 (1980). Despite its close resemblance to fresh fluid milk, commercially reconstituted milk cannot be passed off to consumers as fresh fluid milk because of Federal and State labeling requirements. 45 Fed. Reg. 75,961-75,962 (1980).

ternative to locally produced fresh fluid milk. The regulations also deprive them of the benefits of commercially reconstituted milk's stabilizing effect on milk prices and supplies. (Pet. App. at 5a).[3] In each of the milk market areas where respondents reside, the challenged regulations drive the cost of reconstituted milk products higher than local fresh fluid milk by imposing a tax, called a compensatory payment, on any milk handler who manufactures and markets reconstituted milk.[4] (Pet. App. at 3a-4a). As a result, handlers simply do not manufacture and market reconstituted milk products in the market areas where respondents reside, or in the other market areas covered by the regulations at issue.

The AMAA was enacted in response to the severe economic conditions of the Depression. Concerned about the decline in the purchasing power of farmers, Congress authorized the Secretary of Agriculture to regulate the marketing of agricultural commodities so that farmers (producers) would receive a "fair return to the labor and capital involved in producing [agricultural commodities]." H.R. Rep. No. 6, 73d Cong., 1st Sess. 2-3, 7 (1933). Farmers were to be the primary beneficiaries of the Act, but Congress made it clear that the benefit to the farmer was not to be at the unfair expense of the consumer. As a result, "the bill embodies numerous provisions for the protection of consumers" from excessive prices. H.R. Rep. No. 6, *supra* at 6.

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[3]In the absence of the challenged regulations, handlers could store the dried ingredients, and when fresh milk supplies decline, reconstituted products could be manufactured to meet demands. This would, in turn, help stabilize milk prices, which generally increase during the winter months when production is lower. (C.A. App. at 46-47).

[4]45 Fed. Reg. 75,957 (1980).

The challenged regulations are not expressly authorized by the AMAA, but instead were issued pursuant to incidental rulemaking authority vested in the Secretary. Such authority may be exercised only when consistent with and necessary to effectuate the other provisions of the Act. 7 U.S.C. § 608c(7)(D). The Secretary claims that the regulation of milk handlers who manufacture reconstituted milk from milk powder is necessary to effectuate the explicit price fixing provisions of the Act.[5] *See* 34 Fed. Reg. 16,883 (1969).

The Secretary's rulemaking authority under the AMAA is carefully limited. In section 602, 7 U.S.C. § 602, Congress spelled out five specific policy objectives, and in section 608, prohibited the Secretary from issuing any market orders that do not effectuate these policies. 7 U.S.C. § 608c(4). Two of these five policy objectives express the congressional goal to protect the interests of consumers. The first protects against unduly high prices, 7 U.S.C. § 602(2), and the second protects against unreasonable fluctuations in supplies and prices. 7 U.S.C. § 602(4).[6] Section 608c(5)(G) further limits the Secretary's authority

[5] These explicit price fixing provisions relate to the price handlers pay producers for raw milk. The Act expressly authorizes the Secretary to issue regulations to assure that milk handlers pay a uniform price to milk producers for milk based on the way the handler uses the milk. 7 U.S.C. § 608c(5). The regulations must also assure that milk producers receive a uniform or "blend" price from handlers regardless of how their milk is used. *Id.*

[6] Section 602 reads in pertinent part as follows:

"It is declared to be the policy of Congress –

. . .

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a

(continued)

by prohibiting the Secretary from issuing milk market orders that prohibit, or in any manner limit, the marketing in that area of a milk product produced anywhere in the United States. 7 U.S.C. 608c(5)(G).

Under the current regulations,[7] a handler who purchases milk powder from outside the order area and manufactures it into a reconstituted fluid milk product must report this fact to the order area administrator. (Pet. App. at 4a). This reconstituted milk product is then regulated not as a milk product, but as though it were fresh milk coming into the order area from an unregulated area. (Pet. App. at 4a). It is automatically "down-allocated," that is, it is

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(continued)

rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

. . .

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

. . .

7 U.S.C. § 602(2) and (4).

[7] Until 19 years ago, reconstituted milk products were not regulated under the milk market orders. This changed in 1963 and 1964 when the Secretary issued regulations governing reconstituted milk products. 28 Fed. Reg. 11,456, 11,848, 12,000 (1963); 29 Fed. Reg. 9002, 9110, 9214 (1964). In 1969, the Secretary expanded the regulations to cover reconstituted "filled" milk. 34 Fed. Reg. 16,548, 16,881 (1969).

assumed that the handler used it for the lower value, or Class II uses.[8] If the handler's records show that he has not manufactured enough Class II products to account for all the reconstituted milk products, the handler is required to make a compensatory payment on the remainder. (Pet. App. at 4a-5a).

The compensatory payment is equal to the difference between the Class I and Class II prices. It is made to a producer settlement fund for distribution, not to the producers of the milk from which the milk powder is made, but to the local producers who supply the fresh milk in the particular order area where the handler is located. (Pet. App. at 5a).[9]

B. The Administrative Process

On August 23, 1979, respondents, together with a nonprofit consumer organization, Consumer Nutrition Institute ("CNI"), and a milk handler, Joseph Oberweis, petitioned the Secretary of Agriculture to rescind the regulations requiring handlers who manufacture reconstituted milk to make a compensatory payment to local milk producers.

Respondents contended that when added to the costs of milk powder, transportation, warehousing, and process-

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[8]Under all the market orders, handlers pay the highest "Class I" price for raw Grade A milk used for fluid consumption. Raw grade A milk purchased by the handler and used for other fluid products such as cream or condensed milk and for solid milk products is priced at a lower "Class II" rate. (Some orders divide the lower-value uses into Class II and Class III rates. For purposes of simplicity, this discussion assumes a single lower-value classification.)

[9]Similar regulations also apply to and effectively prohibit the manufacture of reconstituted milk products from powder produced within the order area. *See* n. 7, *supra*.

ing, the compensatory payment drives the cost of the reconstituted milk product so high that it cannot compete with fresh fluid milk.

Respondents asserted that elimination of the compensatory payment could save consumers on average 18.8 cents per gallon of fluid product.[10] Respondents further pointed out that the availability of reconstituted milk products would help prevent fluctuations in milk supplies and price increases during winter months when fresh milk production declines. Respondents cited studies showing that removing the restrictions on reconstituted products would not undermine the AMAA's objective of assuring stable market conditions for milk producers. In light of this information, respondents claimed that the existing regulations exceed the Secretary's authority to issue only regulations necessary to effectuate the objectives of the Act. Respondents' petition to the Secretary also charged that the regulations were arbitrary, capricious, were not substantiated by the information of record before the Secretary, and that the regulations violated the provisions of the AMAA prohibiting economic trade barriers on milk and milk products. (C.A. App. at 41-49).

C. **The Decisions Below**

After waiting 19 months for the Secretary to act on their petition, on December 2, 1980, respondents filed this suit seeking judicial review of the regulations and the Secretary's failure to act on their petition. On April 7, 1981, the

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[10]The Secretary has done his own study on cost-savings since respondents submitted their petition. The Secretary's study projected that within three years consumers will save $186 million annually in fluid milk expenditures if the challenged regulations are repealed. 45 Fed. Reg. 75,971 (1980).

Secretary denied respondents' petition. On September 29, 1981, the district court granted the Secretary's (petitioner herein) motion to dismiss on the grounds that the individual consumer respondents and CNI lacked standing, and that handler Oberweis had failed to exhaust his administrative remedies.

The court of appeals affirmed the dismissal of the handler and organizational plaintiffs, but reversed the district court concerning the three individual consumer plaintiffs.[11] Judge Wilkey, joined by Judge Tamm, exhaustively reviewed the constitutional requirements and prudential considerations for standing adopted by this Court and held that the individual consumers had standing to challenge the actions of the Secretary. Specifically, the court of appeals found that respondents had sufficiently alleged injury in fact, had presented a redressable claim, were within the zone of interest created by the AMAA and were not precluded from seeking review.

REASONS FOR DENYING THE PETITION

Petitioners present two rationales justifying the granting of a writ of certiorari. First they claim the decision below is in direct conflict with the decision of the Ninth Circuit in *Rasmussen v. Hardin,* 461 F.2d 595 (9th Cir.), *cert. denied,* 409 U.S. 933 (1972).

The court of appeals explicitly held that consumer standing is not precluded by the AMAA. (Pet. App. at 26a-27a, n. 75). *Rasmussen,* a 13-year-old case which held that consumer standing is precluded, has not been relied upon in the Ninth Circuit or other circuits. Moreover, since *Rasmussen,* the Ninth Circuit's enunciated preclusion of

[11]The organizational and handler plaintiffs have not filed a petition for writ of certiorari.

review standards have been consistent with this Court's decision in *Barlow v. Collins,* 397 U.S. 159 (1970) and the decisions of the D.C. Circuit, followed by the court below. Therefore, any conflict between the circuits on the basis of *Rasmussen* is speculative at best.

The petitioners' second reason for justifying the grant of a writ of certiorari is that even if all consumers are not precluded from seeking review, these plaintiffs have not satisfied the requisite constitutional and prudential requirements for standing. The court of appeals reviewed all relevant case law and found all of the elements of standing satisfied by the allegations of respondents. The government has failed to demonstrate that the decision of the court of appeals is in conflict with or even inconsistent with the holdings of this Court or other courts. Therefore, there is no reason to justify review by this Court.

1. The court of appeals rejected petitioners' argument and the reasoning of *Rasmussen* that Congress had impliedly precluded consumers from challenging milk market orders because it had explicitly established judicial review procedures for handlers and not for consumers. Judge Wilkey and Judge Tamm held that the inference drawn from Congress providing review procedures only for handlers "does not constitute the type of clear and convincing evidence of congressional intent needed to overcome the presumption in favor of judicial review, . . . especially since no legislative history or statutory language is cited." (Pet. App. at 26a-27a, n. 75).[12]

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[12]It is important to note that the dissent of Judge Scalia, relied upon heavily by petitioners, did not even mention petitioners' preclusion argument. Instead, Judge Scalia's one reference to *Rasmussen* was in the context of a discussion of the weight to be given the general policy section of 602(2) of the AMAA as establishing an interest of consumers. (Pet. App. at 40a).

Where, as in this case, the relevant statute does not expressly prohibit review, the party asserting nonreviewability has "the heavy burden of overcoming the strong presumption" in favor of review. *Dunlop v. Bachowski,* 421 U.S. 560, 567 (1975).[13] Moreover, it was recognized by this Court in *Barlow v. Collins, supra,* that preclusion could be "implied only upon a showing of 'clear and convincing evidence' of a contrary legislative intent that the courts should restrict access to judicial review." 397 U.S. at 167, *quoting Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967).

Rasmussen, decided within months of *Barlow,* was perhaps a hasty reaction to *Barlow* and cannot be seen to conflict with the D.C. Circuit's well reasoned opinion in this case, which reflects 13 years consideration of the implied preclusion holding contained in *Barlow.* Petitioners' reliance upon *Rasmussen* is also unpersuasive since it is a decision of flawed reasoning, and petitioners cannot show any case that has followed or was based upon its reason-

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[13]An examination of just one of the cases relied upon by petitioners demonstrates how far short they fall in meeting their burden. In Morris v. Gressette, 432 U.S. 491 (1977), this Court found that review was "necessarily precluded" in order to fulfill the congressional intent to provide an expeditious method of implementing valid state voting rights legislation. *Id.* at 505. Permitting review would "unavoidably extend" a process which Congress had expressly intended to be expedited. *Id.* at 504-05. In stark contrast to *Morris,* preclusion of review by consumers is not necessary to effectuate any provision of the AMAA. That the interests of consumers may conflict with those of producers or handlers will not impair legitimate actions of the Secretary to benefit those latter groups. Any regulation will remain in effect pending a consumer challenge, and will be abrogated only upon a showing that the Secretary has acted outside the scope of his authority. Such a result can hardly be said to impair the proper functioning of the Act.

ing.[14] The Ninth Circuit's present view of the standards for preclusion of judicial review is consistent with *Barlow v. Collins.* Under these standards, it is unlikely that the Ninth Circuit, if faced with the issue today, would follow the result in *Rasmussen.*[15]

Since *Rasmussen,* the Ninth Circuit has held that "judicial review will not be cut off unless clear and convincing evidence discloses that Congress had both considered and prohibited review of the agency action in question." *Kitchens v. Department of Treasury, Bureau of Alcohol, Tobacco, and Firearms,* 535 F.2d 1197, 1199 (9th Cir. 1976). In another case interpreting the implied preclusion guidance of *Barlow* the Ninth Circuit has stated:

> The jurisdictional "question [should be] phrased in terms of 'prohibition' rather than 'authorization' because . . . judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." (*Abbott Laboratories v. Gardner,* 387 U.S. 136, 140, . . . HEW has the burden of establishing by " 'clear and convincing evidence' " that Congress, in enacting section 1316, "clearly command[ed]" that review be prohibited. (*Barlow v. Collins* (1970) 397 U.S. 159, 167, . . .).

County of Alameda v. Weinberger, 520 F.2d 344, 348 (9th Cir. 1975).

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[14]Defendant's reliance upon Suntex Dairy v. Bergland, 591 F.2d 1063 (5th Cir. 1979), to support their preclusion argument is misplaced. *Suntex Dairy* did not have before it the issue of consumer standing and rejected *Rasmussen's* reasoning that nonhandlers were precluded from seeking judicial review. *Id.* at 1066-67.

[15]Indeed it is noteworthy that *Rasmussen* was decided by only two Judges, due to the death of one panel member while the matter was *sub judice.*

Petitioners fail in their burden to justify preclusion, because if consumers are precluded, then it would reasonable follow that producers, who also are not mentioned in the judicial review provisions of the Act, would also be precluded. This Court and other courts, however, have consistently recognized the standing of producers and others to challenge market orders. These courts have repeatedly considered and rejected *Rasmussen's* reasoning that nonhandlers are precluded review because the AMAA provides a remedy only to handlers, and such review must be sought first from the Secretary. *Stark v. Wickard,* 321 U.S. 288 (1944); *Suntex Dairy, supra; Consolidated-Tomoka Land Co. v. Butz,* 498 F.2d 1208 (5th Cir. 1974).[16]

The *Rasmussen* court did look at *Stark v. Wickard, supra,* but distinguished it on the basis that this Court limited its holding only to situations where funds belonging to producers were improperly diverted to others. *Rasmussen, supra* at 600. While the plaintiffs in *Stark* were producers who had a proprietary interest in the fund, neither this Court's holding nor the subsequent cases have been so limited. In *Suntex Dairy v. Bergland, supra,* a case heavily relied upon by petitioners, the court in fact ex-

[16]Under the AMAA, market orders may only be issued after a rulemaking proceeding, including a hearing, 7 U.S.C. § 608c(3) and (4), and may only become effective if approved by two-thirds of the producers in areas covered by the order, 7 U.S.C. § 608c(8). Once a market order is imposed, only handlers are expressly given an opportunity to seek administrative and then judicial review. 7 U.S.C. § 608c(15). Handlers must first exhaust their administrative remedies before seeking judicial review under 7 U.S.C. § 608c(15). If producers or consumers object to an issued order, there is no administrative remedy to exhaust and no judicial remedy expressly provided in the AMAA. Consequently, consumers and producers may seek review of such order directly in district court under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

pressly rejected the argument that producers have standing only with respect to specific procedural or other express rights in the Act. Instead, the *Suntex* court allowed the producers to launch a broad challenge to the regulation as not being supported by substantial evidence. *Id.* at 1067. *See also* n. 18, *infra.*

Equally invalid is petitioners' argument that permitting review by consumers would enable a handler to avoid exhaustion of administrative remedies requirements by aligning himself with a consumer to bring suit in district court. No such circumvention has been found to occur by permitting producers to have direct access to the courts, and circumvention in such cases would be much more likely to occur since many handlers are also producers. *See e.g., Dairylea Cooperative, Inc. v. Butz,* 504 F.2d 80, 82 (2nd Cir. 1974) (Dairylea Cooperative, an association of dairy producers which also acted as a milk handler, was allowed to seek review without exhausting any administrative remedy.). Moreover, this argument overlooks the fact that it is to the handler's advantage to first pursue his remedy before the Secretary. Not only may he be able to avoid altogether a costly and time-consuming court proceeding, but he may not be subject to any money penalties for violation of the challenged order during the pendency of his complaint before the Secretary. 7 U.S.C. § 608c(14). By initiating the administrative review process, a handler may simple continue his current practices until and unless the Secretary affirms the challenged regulation.

Finally, the petitioners and the respondent-intervenor milk producers point to the delicate balance of the agricultural market system, which extends beyond milk to fruits, vegetables, tobacco, and other products. They express concern about the "potential for considerable mischief," if judicial review is available to consumers, who, unlike handlers, need not exhaust administrative remedies.

(Pet. at 16-18). Petitioners, invoking this Court's decision in *United States v. Ruzicka,* 329 U.S. 287 (1946), urge that absent initial resort to the Secretary, congressional interest in an orderly market system would be frustrated if consumers could challenge market orders.[17]

This seems overly reactive given the discretion provided to the Secretary under the express and incidental rulemaking authority of the AMAA. The market orders of the Secretary should be easily defended if they are within the scope of his authority and supported by an adequate rulemaking record. The decision of the court of appeals is not going to open the floodgates of litigation, as anticipated by petitioners, providing that the Secretary has not exceeded his authority under law.[18]

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[17]Petitioners' reliance on *Ruzicka* is misplaced. *Ruzicka,* a case dealing solely with the rights of handlers, explicitly acknowledged that under *Stark v. Wickard,* producers may seek judicial review of market orders irrespective of the administrative process that handlers must exhaust. 397 U.S. at 1295. In *Ruzicka,* this Court also recognized congressional interest in requiring handlers to challenge particular market orders in a timely fashion and not wait to raise those challenges in enforcement proceedings. That case required handlers to use and exhaust the remedies provided to them by Congress. The concerns expressed in *Ruzicka* for an orderly system do not extend to situations where consumers or producers, who are not provided administrative remedies and whose challenges will not disrupt enforcement proceedings, seek judicial review of a milk market order.

[18]Producers, importers and unregulated handlers have been judicially recognized to have standing to challenge marketing orders, with no apparent resulting burdensome litigation. *Stark v. Wickard, supra;* Walter Holm & Company v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971) (tomato importers have standing to challenge market regulation although they are not domestic handlers directly governed by the order); Harry H. Price & Sons, Inc. v. Hardin, 425 F.2d 1137, 1140 (5th Cir. 1970), *cert. denied,* 400 U.S. 1009 (1970) (unregulated handler of tomatoes has standing to challenge marketing orders and regulations although it is only "indirectly affected.").

This argument has been raised before to this Court when producers were granted standing to challenge market orders issued under the AMAA. This Court's statement about that issue in relation to producers, applies equally to consumers:

> It is suggested that such a ruling puts the agency at the mercy of objectors, since any provisions of the Order may be attacked as unauthorized by each producer. To this objection there are adequate answers. The terms of the Order are largely matters of administrative discretion as to which there is no justiciable right or are clearly unauthorized by a valid act. United States v. Rock Royal Co-op., 307 U.S. 533, . . . Technical details of the milk business are left to the Secretary and his aides. The expenses of litigation deter frivolous contentions. If numerous parallel cases are filed, the courts have ample authority to stay useless litigation until the determination of a test case.

Stark v. Wickard, supra, 321 U.S. at 310.

Therefore, consumers are not as a class precluded from seeking review of AMAA market orders under the Administrative Procedure Act. 5 U.S.C. § 551 *et seq.*

2. The court of appeals did not err in concluding that the consumer respondents in this case have standing to maintain their challenge to the market order provisions at issue. An examination of how the court of appeals considered the constitutional and prudential issues of standing will demonstrate that it meticulously followed the decisions of this Court. Petitioners' complaint is more that the court of appeals did not decide ultimate issues of merit rather than with the standards applied or conclusions made in this case.

The court of appeals first analyzed the three elements of standing imposed by Article III of the Constitution. The court found "injury in fact" in that the consumers had alleged a definable and discernible injury. (Pet. App. at 13a). First, the court found sufficient respondents' allegation that as a result of the Secretary's order, "they are precluded from purchasing a 'nutritious dairy beverage at a lower price than fresh drinking milk.' " The court of appeals also found adequate the allegation that "they [consumers] are deprived 'of a stabilizing market influence,' since '[a] reconstituted fluid product could quickly expand the fluid milk supply when [seasonal] changes result in a reduction of the whole fluid milk supply.' " (Pet. App. at 13a).

The second and third constitutional elements of standing were carefully distinguished by the court and found to have been satisfied by respondents. Judge Wilkey's opinion held that the "fairly traceable causation" element and the "redressability" element, though related, were not necessarily interchangeable. (Pet. App. at 9a).

The court stated that "[t]he fairly traceable causation inquiry is directed toward the connection between the alleged injury and the defendant's actions." (Pet. at 16a). The court found this causation on the basis of allegations of the consumers that if handlers were not required to make a compensatory payment, they would pass the savings on to consumers. The court found this to be a reasonable assertion and, for the purposes of determining standing, did not find it necessary to take its inquiry further. (Pet. App. at 16a). Petitioners assert that several different market factors may negate the passing on of reduced prices to consumers. Judge Wilkey, however, stated, "If standing depended upon a plaintiff's ability to allege uncontro-

verted facts, there would be very few plaintiffs who could establish standing in a lawsuit of any complexity." *Id.*[19]

Concerning the last element of constitutional standing, the court stated that in contrast to causation, "[t]he redressability inquiry . . . focuses on the connection between the injury and the *action requested of the court.*" (Pet. App. at 9a) (emphasis in original). While the district court had rejected consumers' reliance on a Department of Agriculture Impact Statement that predicts, if the compensatory payment requirement were eliminated, consumers nationwide would save $186 million annually within three years, the court of appeals found the impact statement sufficient to support consumers' allegations. The court of appeals stated:

> The district court found this showing inadequate because the same USDA statement relied upon by Consumers estimated that elimination of the compensatory payment requirement would cost milk *producers* $576 million. The [district] court observed that this drop in producer earnings "*might* interfere with the public's access to an adequate supply of milk and *might* result in higher prices for milk products." The court concluded that since the structure of the dairy industry is so complex, "any benefit to the plaintiffs from the proposed changes in the regulations is hypothetical and speculative." We conclude that the district court required too much of Consumers.

(Pet. App. at 18a) (emphasis in original).

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[19]The court of appeals also noted that respondents had, in fact, done much more than simply allege a causal link. Respondents had proffered evidence that supported their allegations. (Pet. App. at 61a, n. 44)

The court of appeals found it reasonable to conclude that the judicially ordered elimination of the compensatory payment required to be made by handlers could result in reduced prices being passed on to consumers. The court concluded that respondents had in fact satisfied the constitutionally required elements of standing.

The court of appeals then analyzed the prudentially required elements of standing and held that the respondents were within the zone of interests of the AMAA and that the grievance complained by respondents was not generalized. Judge Wilkey followed his recent opinion in *Tax Analysts and Advocates v. Blumenthal,* 566 F.2d 130 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978), in finding, on the basis of the congressional goals contained in sections 602(2) and 602(4) of the AMAA, that respondents were within the zone of interest of the AMAA to challenge the Secretary's action under section 608c.

Judge Wilkey noted that *Tax Analysts* stood for the proposition that the zone of interests test was of a generous nature and that "a plaintiff was only required to assert an interest 'which *is arguable from the face of the statute.*' " (Pet. App. at 22a *quoting Tax Analysts* at 142) (emphasis in original). Since section 608c(4) requires the Secretary to review milk marketing orders in relation to how they "will tend to effectuate the declared policy of this chapter," the purposes of the Act are identified with the section being enforced. The court of appeals went on to say:

> The declared policies of the AMAA are contained in section 602. Section 602(4) clearly expresses the policy that the Secretary use "the powers conferred . . . under this chapter . . . as will provide in the interests of producers *and*

> *consumers,* an orderly supply [of milk] . . . *to avoid unreasonable fluctuations in supplies and prices.*" Since Consumers allege that the challenged portion of the milk market orders prohibit the sale of reconstituted milk, resulting in higher milk prices and seasonable shortages, they [consumer plaintiffs] have asserted an interest which is at least "arguably" within the zone of protected interests.

Pet. App. at 22a-23a (emphasis in original) (footnotes omitted).

Petitioners argue that the consumer plaintiffs are not within the "zone of interest" of the AMAA because their interest in a lower cost alternative to fluid milk is directly antithetical to the interests of producers, the primary beneficiaries of the AMAA. (Pet. at 2). An examination of the decisions of this Court enunciating and applying the zone test reveals that petitioners' argument has no merit. Those cases have granted standing to parties whose interests were directly opposed to the interests of the primary beneficiary of the relevant statute. *Arnold Tours, Inc. v. Camp,* 400 U.S. 45 (1970); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1969).

Congress did not give the Secretary of Agriculture a free rein to take any action which might be in the interest of producers. To the contrary, "the text and legislative history of this statute make it plain that the Secretary was required to operate within the narrow confines of powers expressly granted." *Fairmont Foods Co. v. Hardin,* 442 F.2d 762, 766 (D.C. Cir. 1971).

The result urged by petitioners would create the unusual and unintended situation of leaving only producers and

handlers as the guardians for aggrieved consumers when the Secretary acts outside the narrow confines of the Act and violates the statutory policies protecting consumers. In enacting the AMAA, Congress sought to provide dairy farmers a fair return on their investment adequate to assure a stable supply of milk. At the same time, 7 U.S.C. § 602(2) reflects congressional concern that consumers not bear the brunt of any regulation that maintains producer prices higher than necessary to accomplish this purpose. By asserting that the existing regulations are unnecessary to adequately protect farmers and that the regulations harm consumers, respondents bring themselves squarely within the statute's zone of interest. *See Schepps Dairy, Inc. v. Bergland,* 628 F.2d 11, 19 (D.C. Cir. 1979) (one of the principal statutory policies of the AMAA is "to protect the health and purses of consumers").

The court of appeals carefully considered the issues raised by petitioners and decided only that *these* consumers indeed had standing to challenge *these* milk market orders. Petitioners do not claim conflict with other circuits or even the application of incorrect standards. They argue only that the court of appeals should have gone further. The court below, for purposes of standing, decided not to decide these issues on the merits, and that decision should not be disturbed.

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No. 83-458

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, and
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS,

v.

COMMUNITY NUTRITION INSTITUTE, *ET AL.*

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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JOINT BRIEF OF RESPONDENTS NATIONAL MILK PRODUCERS FEDERATION, ASSOCIATED MILK PRODUCERS, INC. and CENTRAL MILK PRODUCERS COOPERATIVE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the statutory scheme for reviewing market orders set forth in the Agricultural Marketing Agreement Act of 1937 ("AMAA") precludes judicial review of milk market orders at the behest of ultimate consumers of milk products, who are neither regulated handlers nor producers, the direct beneficiaries of the market orders.

2. Whether ultimate consumers of milk products, who assert interests that are either antithetical to the interests Congress sought to promote in the Act or are not implicated by the market orders challenged in this litigation, lack standing to maintain this lawsuit.

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I. STATEMENT

Plaintiffs-Respondents, three individual, ultimate consumers of milk products, have challenged the manner in which reconstituted milk is regulated under forty-seven milk market orders adopted pursuant to the AMAA.[1] The

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[1] 7 U.S.C. §§ 601 *et seq*. (1976 & Supp. V 1981).

proceedings in the district and appellate courts are set forth in detail in the petition and shall not be repeated here.

II. ARGUMENT: PLAINTIFFS, ULTIMATE CONSUMERS OF MILK PRODUCTS, ARE PRECLUDED FROM SEEKING JUDICIAL REVIEW OF MILK MARKET ORDERS BECAUSE THEIR OBJECTIVES IRRECONCILABLY CONFLICT WITH THE SPECIFIC CONSUMER INTERESTS THE AMAA WAS INTENDED TO PROMOTE[2]

Congress clearly did not intend to protect the particular economic interests asserted by the consumer plaintiffs in this case. Their interest in paying lower prices for reconstituted milk is irrelevant to Congress' main purpose in enacting the AMAA, and antithetical to the important consumer interest the statute does protect, that of assuring consumers a stable supply of wholesome fluid milk products. *See* H.R. Rep. No. 1927, 83d Cong., 2d Sess. 5 (1954); S. Rep. No. 1810, 83d Cong., 2d Sess. 45 (1954).

Congress recognized that in order to ensure the availability of a stable supply of wholesome milk products, producers had to receive a reasonable return for their labor and investment. H.R. Rep. No. 6, 73rd Cong., 1st Sess. 7 (1933). *See also H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 530 (1949); *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 533, 570 (1939); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935); *Nebbia* v. *New York*, 291 U.S. 502, 517 (1934). This necessarily meant *raising* producers' prices above unprofitable competitively determined price levels. H.R. Rep.

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[2] This brief does not directly address the second question presented, on standing. Standing is discussed thoroughly in the petition.

No. 1241, 74th Cong., 1st Sess. 7 (1935); S. Rep. No. 1011, 74th Cong., 1st Sess. 3 (1935).

Through their regulatory challenge, which is intended to effect a reduction in consumer prices for reconstituted milk, the consumer plaintiffs here would force a reduction in producer prices by displacing minimum-price *regulated* milk by *unregulated* supplies of reconstituted milk. The effect would be to deprive producers of the income protection Congress intended for them, and so destabilize the nation's fluid milk supply. Upholding jurisdiction over such a suit would therefore create a clear threat to the principal consumer interest the AMAA was enacted to protect.

Under the AMAA the Secretary has issued market orders encompassing many agricultural products including milk, fruits, vegetables, tobacco, and other products collectively worth about six billion dollars in 1982. Should the appellate court's decision here be left standing, consumers would be encouraged to challenge the delicate regulatory structures of federal market orders, which cover not only milk but the entire array of agricultural products.[3] The resulting instability in the affected markets would harm both consumers and producers, frustrating the intent of Congress as clearly manifested in the AMAA.

[3] *See* 7 U.S.C. § 608c(2) (1976).

III. CONCLUSION

The Petition for Writ of Certiorari should be granted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

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1. As we pointed out in our petition (at 14-16), the decision below is in direct conflict with *Rasmussen* v. *Hardin*, 461 F.2d 595 (9th Cir.), cert. denied, 409 U.S. 933 (1972). Respondents do not deny that the conflict exists; instead, they argue that *Rasmussen* is no longer good law and speculate that the Ninth Circuit might not follow *Rasmussen* today (Br. in Opp. 10-11). Respondents are wrong about the continuing vitality of *Rasmussen*, and their speculation about how the Ninth Circuit would decide the case today is entirely unfounded.

a. Respondents' contention (Br. in Opp. 10-11) that *Rasmussen* has not been followed by other courts is specious. Indeed, until respondents filed suit in the instant case, *Rasmussen* had so clearly established the law on the subject of congressional intent to preclude consumer challenges to

milk market orders that no other consumer suits have been brought. Thus, no other courts have had occasion even to consider departing from *Rasmussen*. What is more, if the decision below is allowed to stand, no other courts ever will have the opportunity to address the issue presented by this case because the District of Columbia Circuit has now established itself as a nationwide forum for all consumer suits that heretofore have been barred on the authority of *Rasmussen*. Thus, resolution of this conflict is important.

b. Respondents argue (Br. in Opp. 11) that the Ninth Circuit today would apply a stricter test for determining whether Congress intended to preclude review. But the cases they rely upon for that assertion present fundamentally different circumstances. In both cases,* the plaintiffs sued to protect their own direct interests, which were not derivative of the interests of any other party directly regulated or affected by the statutes in question. Here, by way of contrast, the AMAA establishes a cooperative program involving the Secretary of Agriculture, producers, and handlers. As Judge Scalia noted below in dissent, "the whole premise" of liberalized notions of judicial review has no applicability when there is a "direct and immediate beneficiary class which can be relied upon to challenge agency disregard of the law" (Pet. App. 38a). In such circumstances, there is no justification and no necessity for concluding that Congress intended courts to grant judicial review at the behest of a class as remote and generalized as all milk consumers in the country.

c. Respondents also contend (Br. in Opp. 13) that handlers will not use the decision below to avoid the statutorily-mandated administrative exhaustion requirements because, according to respondents, it is actually in

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**Kitchens* v. *Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms*, 535 F.2d 1197 (9th Cir. 1976); *County of Alameda* v. *Weinberger*, 520 F.2d 344 (9th Cir. 1975).

the interests of handlers to pursue administrative remedies prior to bringing suit. If this were really so, one must ask why respondent Oberweis (the handler in this case) failed to exhaust his administrative remedies (see Pet. App. 31a-33a) prior to aligning himself in court with consumers whose complaint the court of appeals has ordered to be heard without regard to the statutory exhaustion requirements.

More fundamentally, respondents have misstated the statutory scheme. Citing 7 U.S.C. 608c(14), respondents contend (Br. in Opp. 13) that by initiating the administrative review process prior to bringing suit a handler "may simple [*sic*] continue his current practices until and unless the Secretary affirms the challenged regulation." In fact, 7 U.S.C. 608c(14) merely protects a handler against the imposition of *monetary* penalties during the pendency of the Secretary's consideration of a handler's petition for review. During that time, however, a handler is *not* free to "continue his current practices" because the United States is authorized to seek injunctive relief against the violation of any order, regulation, or agreement issued under the Act without regard to the pendency of administrative proceedings. See 7 U.S.C. 608a(6). Moreover, a court reviewing the Secretary's disposition of a handler's petition for review may not interfere with the government's right to seek injunctive relief under 7 U.S.C. 608a(6). See 7 U.S.C. 608c(15)(B). This unusual limitation on the scope of judicial authority clearly demonstrates the importance Congress attached to the administrative process created by the statute and its intention not to permit interference with that scheme. Thus, the danger of handlers aligning themselves with consumers in order to circumvent Congress's intent is real.

2. Respondents misstate our position with respect to the court of appeals' decision on standing. Respondents contend (Br. in Opp. 15, 20) that we challenge the court of

appeals' failure to decide "ultimate issues [on the] merit[s]." Our complaint is precisely the opposite. Our quarrel with the court of appeals is that it has allowed respondents to proceed to a trial on the merits without first requiring them to prove that they satisfy the constitutional and prudential limitations of the standing doctrine.

Respondents' position seems to be that bare allegations of speculative injury and redressability are sufficient to entitle them to a trial on the merits. The court of appeals agreed with respondents, holding that at this stage of the litigation respondents should be given the benefit of the doubt and allowed the opportunity to prove their standing allegations at trial (Pet. App. 18a-19a). But it is firmly established that controverted allegations of standing must be supported *before* trial. See, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 501-502 (1975). Strict adherence to that requirement is particularly necessary in this case because the trial on the merits that the court of appeals has ordered will likely be devoted to issues wholly unrelated to respondents' standing. Indeed, the court itself recognized that the questions to be resolved on the merits are narrow in scope (Pet. App. 34a n.95; emphasis in original): "The compensatory payment regulation should be sustained if it is within the Secretary's granted power, issued pursuant to proper procedure, and supported by adequate evidence and reason *when adopted*." Thus, the trial court would have no authority to order the Secretary to adopt different regulations merely because such regulations might make more reconstituted milk available for purchase by consumers or might lower its price. Under these circumstances, the trial on the merits is not likely to produce any evidence supportive of respondents' standing allegations. Respondents should not be allowed to proceed until and unless these defects have been corrected.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1983

DOJ-1983-11

No. 83-458

In the Supreme Court of the United States

OCTOBER TERM, 1983

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act of 1937 provides that a handler regulated by a market order issued pursuant to the Act may challenge that order in an administrative proceeding before the Secretary of Agriculture (7 U.S.C. 608c(15)(A)). The Act further provides that if a handler is dissatisfied with the Secretary's decision, he may then obtain judicial review of that decision in the appropriate federal district court (7 U.S.C. 608c(15)(B)). The questions presented are:

1. Whether this statutory scheme for reviewing market orders precludes judicial review of milk market orders at the behest of ultimate consumers of milk products, who are neither regulated handlers granted a right of review by statute, nor producers, the direct beneficiaries of the market orders.

2. Whether ultimate consumers of milk products, who assert interests that are either antithetical to the interests Congress sought to promote in the Act or are not implicated by the market orders challenged in this litigation, lack standing to maintain this lawsuit.

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption, Deborah Harrell, Ralph Desmarais, Zy Weinberg, and Joseph Oberweis were plaintiffs in the district court and appellants in the court of appeals, and are respondents here. The National Milk Producers Federation, the Associated Milk Producers, Inc., and the Central Milk Producers Cooperative were granted leave to intervene as defendants in the district court, appeared as appellees in the court of appeals, and, pursuant to Rule 19.6 of the Rules of this Court, are respondents in this Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 698 F.2d 1239. The opinion of the district court (Pet. App. 53a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 45a-46a) was entered on January 21, 1983. A petition for rehearing was denied on April 19, 1983 (Pet. App. 50a).[1]

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[1] The government's petition for rehearing was denied on March 28, 1983 (Pet. App. 47a). The time for filing a petition for a writ of certiorari did not begin to run, however, until the court of appeals denied the petition for rehearing filed by the intervenor-appellees. See Rule 20.4 of the Rules of this Court.

On July 8, 1983, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 16, 1983. The petition was filed on that date and was granted on November 28, 1983 (J.A. 82). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, are set forth at Pet. App. 69a-95a.

STATEMENT

This case arises out of the federal regulation of the milk industry through the use of market orders, each of which consists of a series of complex regulations establishing the minimum prices handlers must pay for farmers' milk in a given geographic region. The market orders are issued by the Secretary of Agriculture under authority of the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.* The issue in this case is the propriety of a challenge to milk market orders by unregulated ultimate consumers of milk products who are nowhere included in the statutory scheme for administrative and judicial review of market orders and whose asserted interests are antithetical to the interests Congress sought to promote in the statute.

1. a. Section 8c of the AMAA, 7 U.S.C. 608c, authorizes the regulation of numerous agricultural commodities and products, including milk.[2] One of Congress's primary

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[2] Statutory authorization for the issuance of milk market orders (then called licenses) was first contained in the Agricultural Adjustment Act of 1933 (AAA), ch. 25, § 8(3), (4), and (5), 48 Stat. 35. See *Zuber* v. *Allen*, 396 U.S. 168, 174-175 (1969). The legality

purposes in enacting the AMAA was to end destructive price competition in the dairy industry, the structure of which "is so eccentric that economic controls have been found at once necessary and difficult." *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 529 (1949).

The ruinous competition among dairy farmers that concerned Congress centered on fluid milk sales because such sales bring higher prices than do sales of milk for "surplus" use, *i.e.*, use in manufacturing butter, cheese, and other milk products. See *Zuber* v. *Allen*, 396 U.S. 168, 172-176 (1969); *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 548-550 (1939); *Nebbia* v. *New York*, 291 U.S. 502, 515-518, 530 (1934).[3] One of the principal tools Congress used to end farmers' counterproductive competition for fluid milk sales and to

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of this program was cast into doubt by the Court's decision in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). "With its agricultural marketing program resting on quicksand, Congress moved swiftly to eliminate the defect of overbroad delegation and to shore up the void in the agricultural marketing provisions." *Zuber* v. *Allen*, 396 U.S. at 175. It did so by enacting significant amendments to the AAA in 1935 (Act of Aug. 24, 1935, ch. 641, 49 Stat. 750 *et seq.*). The market order program was again put in jeopardy when in *United States* v. *Butler*, 297 U.S. 1 (1936), the Court invalidated certain taxing provisions of the AAA. Congress responded by passing the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, which reenacted the market order provisions of the 1935 legislation. The provisions of the AMAA at issue in this litigation are in all material respects unchanged from the 1935 legislation. For convenience, we discuss in this brief the provisions of the AMAA, except where specific reference to earlier legislation is required.

[3] Fluid milk must be consumed relatively quickly after it is produced because it is a naturally fertile field for the growth of bacteria. If it cannot be marketed quickly in fluid form, it must be manufactured into cheese, butter, powder, or other milk products that can be stored for longer periods. Milk that cannot be disposed of in fluid form is referred to in the trade as "surplus," and it commands a lower price than fluid milk because it is manufactured into products that compete directly with similar products produced at various times from across the nation. See Pet. App. 3a.

guard against its recurrence was the market order system authorized by 7 U.S.C. 608c. The "essential purpose of [the market orders regulating commodities is] to raise producer prices." S. Rep. 1011, 74th Cong., 1st Sess. 3 (1935). With respect to milk, such orders provide a method by which the benefits of the desirable fluid milk market and the burdens of the surplus milk market are fairly and proportionally shared among all dairy farmers supplying a given market. See *Nebbia* v. *New York*, 291 U.S. at 517-518.

Under the authority of the Act, 45 milk market orders are currently in effect, each encompassing a different region of the country and collectively including most of the nation (see 7 C.F.R. Pts. 1001-1139).[4] Through these orders, the federal government regulates the handling and pricing of nearly 70% of all milk produced in the United States and more than 80% of all Grade A milk (Agricultural Marketing Service, U.S. Dep't of Agriculture, Statistical Bulletin No. 698, *Federal Milk Order Statistics—1982 Summary*, at 16). Grade B milk, which cannot be sold for drinking purposes, is not regulated under federal orders (see 45 Fed. Reg. 75958 (1980)). The market orders establish minimum prices that handlers (those who process the raw milk) must pay to producers (dairy farmers). Farmers are free to bargain competitively for prices higher than the market order minimums, and the orders do not regulate the retail price of milk.

The order prices are determined according to a classification system based on the end use to which handlers put the raw milk. See 7 U.S.C. 608c(5)(A); 44 Fed. Reg. 65990 (1979). If the milk is used in hard manufactured products such as cheese, butter, dry whole milk,

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[4] At the time this action was brought, there were 47 milk market orders in effect. Since that time, the Secretary has promulgated two orders that had the effect of merging six prior orders into two (47 Fed. Reg. 53693 (1982); 48 Fed. Reg. 52869 (1983)), and, in addition, he has promulgated two orders covering previously unregulated territory (46 Fed. Reg. 28611 (1981); 47 Fed. Reg. 11495 (1982)).

or nonfat dry milk, a handler pays at least the Class II minimum price (*ibid.*).[5] This Class II minimum price changes monthly and equals the average price paid for unregulated, Grade B milk in the most productive dairy regions of the country (45 Fed. Reg. 75958-75959 (1980)). For milk used as fluid milk, a handler pays the higher, Class I minimum price (44 Fed. Reg. 65990 (1979)). The Class I minimum price varies in each order area, but reflects transportation costs plus a premium over the Class II price of 90 cents per 100 pounds of milk (45 Fed. Reg. 75959 (1980)). Under all but three of the market orders, all handlers' minimum price payments for regulated milk used in the different classes are pooled, and farmers are paid from the pool on the basis of the weighted average price received for milk in all uses—the "blend price" (*ibid.*). Thus, handlers pay "in accordance with the form in which or the purpose for which [milk] is used," as required by 7 U.S.C. 608c(5)(A); farmers, on the other hand, receive a uniform, blend price, "irrespective of the uses made of such milk," as required by 7 U.S.C. 608c(5)(B)(ii). These statutory and regulatory mechanisms create and maintain orderly marketing conditions by permitting all farmers to share in the benefits of the desirable fluid market and equalizing the burdens of the surplus market.

b. Reconstituted or recombined milk is manufactured by mixing milk powder with water. See 44 Fed. Reg. 65990 (1979). Consumers can purchase milk powder and reconstitute it themselves. Such consumer-reconstituted milk is not the subject of this litigation. Instead, respondents brought this action to challenge the market order regulation of milk powder that a *handler* reconstitutes into fluid milk.

Since 1964, the Secretary has treated handler reconstituted fluid milk as a Class I product in order to ensure

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[5] Some market orders contain a three-class pricing system. For all practical purposes, however, this case concerns only the difference between Class I and Class II prices (see Pet. App. 3a n.7).

the integrity of the end use classification system. See 29 Fed. Reg. 9010 (1964). The Secretary reconsidered the issue in 1968 and again determined that regulation of reconstituted milk was required to assure uniform and adequate minimum prices and to prevent the recurrence of destructive competition among farmers. The Secretary explained (34 Fed. Reg. 16883 (1969)):

> Primarily the problem relates to the conversion by a handler of a product, such as nonfat dry milk, normally priced as a surplus use into another product for Class I use. In addition, the possible entrance into the market of reconstituted products from unregulated sources enlarges the problem.
>
> The potential of these conditions for disruptive influence on the market for producer milk is extremely serious because disposition of a product for a Class I use but pricing it in a surplus price class undermines the classified pricing system.
>
> * * * * *
>
> The objectives of classified pricing are uniformity of pricing according to form or use and providing an adequate return to producers for the fluid market. Therefore, the widespread disposition of filled milk made from reconstituted skim milk, if the skim milk were not subject to some "equalizing" payment, could lead to total defeat of such objectives. Certainly, the classification and pricing plan should protect the Class I market from the potential effects of competition with products produced from the market's own surplus or similar products produced elsewhere at a manufacturing price when used in filled milk.
>
> * * * * *
>
> In this case payment to the producer-settlement fund at the difference between the Class I price and surplus price is necessary not only to assure competitive equity among handlers but also to insure the integrity of the classified pricing system as a means of assuring reasonable prices to producers.

Accordingly, each of the regional market orders defines reconstituted milk that is used for drinking purposes as "fluid milk," thereby including it in Class I (see 44 Fed. Reg. 65990 (1979)). Under this system, handlers pay at least the minimum Class I price for all milk products used for fluid consumption. In part, this pricing system is accomplished through a series of assumptions and adjustments known as "down allocations" and "compensatory payments" (see 45 Fed. Reg. 75956-75957 (1980); Pet. App. 4a-5a), all of which operate to ensure that handlers pay producers according to the end use to which the producers' milk is put by the handlers (see J.A. 45). The net effect is that handlers who reconstitute dried milk into fluid milk may be required to make a "compensatory payment," equal to the difference between the Class I and Class II prices, into a pool for distribution to producers. It is this compensatory payment to which respondents object, contending that it makes reconstituted milk uneconomical for handlers to produce (see Br. in Opp. 6-7).

2. The Secretary issues a market order only after rulemaking proceedings that include public notice and the opportunity for a hearing (7 U.S.C. 608c(3) and (4)). The evidence introduced at the hearing must show "that the issuance of such [proposed] order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity" (7 U.S.C. 608c(4)). But before a milk market order can become effective, it must be approved by the handlers of at least 50% of the volume of milk covered by the proposed order and at least two-thirds of the dairy producers in the affected region (7 U.S.C. 608c(8), 608c(5)(B)(i)). If the handlers withhold consent, the Secretary may nevertheless impose the order if he determines that it is "the only practical means of advancing the interests of the producers" and at least two-thirds of the producers consent (7 U.S.C. 608c(9)(B)). An order may be terminated by the Secretary (7 U.S.C.

608c(16)(A)) or by a majority of the producers in an order area (7 U.S.C. 608c(16)(B)).

Because this statutory scheme gives handlers considerably less control than producers over the adoption and retention of market orders, the Act expressly provides for administrative and judicial review of market orders at the behest of handlers. Specifically, 7 U.S.C. 608c(15)(A) provides that "[a]ny handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom." If dissatisfied with the Secretary's ruling on the administrative petition, the handler may seek judicial review of "such ruling" in the appropriate district court (7 U.S.C. 608c(15)(B)). The Act contains no other provisions for the review of market orders. The pendency of handler-initiated administrative or judicial review proceedings may not "impede, hinder, or delay" the government from obtaining relief in an enforcement action brought under 7 U.S.C. 608a(6) (7 U.S.C. 608c(15)(B)).

3. In December 1980, respondents[6] commenced this action in the United States District Court for the District of Columbia, seeking a declaration that all of the milk market orders, insofar as they apply to reconstituted milk products and milk powder used to make reconstituted milk products, are invalid, and an injunction prohibiting petitioners from "implementing" the regulations (which have been in effect since 1964) (J.A. 20). The plaintiffs, who included three individual consumers of fluid dairy products, sought to have the Secretary amend the milk market orders so that reconstituted milk would no longer be deemed a Class I product even if a handler

[6] As used in this brief, "respondents" refers to the plaintiffs in the district court and does not include the intervenor-defendants who are respondents in this Court by virtue of Rule 19.6 of the Rules of this Court.

used it as fluid milk.[7] In their complaint, the individual consumers alleged that "[t]he existing regulations have denied them the opportunity to purchase a lower price reconstituted milk product in lieu of raw fluid milk" (J.A. 12).[8] Joseph Oberweis, a handler regulated by one of the market orders, and the Community Nutrition Institute, a self-described "nonprofit charitable organization" (J.A. 11), joined the individual consumers as plaintiffs.

Ruling on cross-motions for summary judgment, the district court dismissed the complaint for lack of jurisdiction (Pet. App. 53a-67a). Citing *Rasmussen* v. *Hardin*, 461 F.2d 595, 599 (9th Cir.), cert. denied, 409 U.S. 933 (1972), and *Suntex Dairy* v. *Bergland*, 591 F.2d 1063, 1067 n.3 (5th Cir. 1979), the district court con-

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[7] Prior to filing suit, respondents had petitioned the Secretary to hold a rulemaking hearing on the same proposal (see 44 Fed. Reg. 65990 (1979)). The Secretary published a Notice of Request for Hearing and asked for comments (*ibid.*). Subsequently, the Secretary published a preliminary impact analysis of respondents' proposal and invited comments (45 Fed. Reg. 75956 (1980)). Respondents filed this action shortly thereafter. Later, on April 7, 1981, the Secretary determined not to hold a rulemaking hearing because respondents' proposal would not further the purposes of the Act and could harm the dairy industry (J.A. 57-63). As a result of this action by the Secretary, the court of appeals held that that portion of respondents' complaint challenging the Secretary's "inaction" on their rulemaking request (J.A. 18, 19, 20) had become moot (Pet. App. 32a n.93). In its present posture, the case is limited to respondents' right to challenge the market orders on their merits.

[8] The complaint described the individual consumers as follows (J.A. 12):

> Plaintiffs Harrell, Desmarais and Weinberg are consumers of fluid dairy products. Due to inflation, they have become extremely cost-conscious and routinely seek to decrease food expenditures without sacrificing taste or the nutritional value of their diet. The existing regulations have denied them the opportunity to purchase a lower priced reconstituted milk product in lieu of raw fluid milk. If such lower priced milk were available they would purchase it.

cluded that Congress intended to preclude ultimate consumers from seeking judicial review of milk market orders (Pet. App. 65a-66a). The district court also held that the consumers lacked standing because, even if the regulations were changed, too many other variables could affect the retail prices paid by consumers for reconstituted milk; thus, the court concluded that "any benefit to the [consumer] plaintiffs from the proposed changes in the regulations is [too] hypothetical and speculative" to confer standing (*id.* at 61a). In addition, the district court concluded that the interest asserted by the consumers—lower prices for one type of fluid milk—was outside the zone of interests protected by the AMAA. The relevant provisions of the statute, the court noted, were intended to protect consumers only against rapid or excessive price increases and against prices above the parity level (*id.* at 62a-64a). Because those interests were not implicated in this case, the court held that the statute did not confer standing on these consumers (*id.* at 64a). Finally, the district court dismissed the milk handler because he had failed to exhaust his administrative remedies under 7 U.S.C. 608c(15) (Pet. App. 66a-67a).

4. A divided panel of the court of appeals affirmed in part and reversed in part, and remanded the case for a decision on the merits. The court of appeals agreed with the district court's dismissal of the milk handler and the nutrition organization (Pet. App. 27a-33a). The court of appeals held, however, that the district court had erred in dismissing the complaint of the individual consumers (*id.* at 12a-26a).

With respect to preclusion of review, the court of appeals declined to follow *Rasmussen* v. *Hardin*, *supra*, concluding that the Ninth Circuit's analysis of the statutory structure of the AMAA and its purposes did not reveal "the type of clear and convincing evidence of congressional intent needed to overcome the presumption in favor of judicial review" (Pet. App. 27a n.75). As for

standing, the court concluded that the individual consumers had satisfactorily alleged injury in fact by claiming that the regulations deprive them of a lower priced alternative to whole milk and that the absence of manufacturer reconstituted milk results in seasonal shortages in the milk supply (*id.* at 14a). The court repeatedly questioned whether the consumers' allegations of injury and redressability were capable of proof, but it concluded that they were sufficient to require a trial on the merits (*id.* at 14a, 16a, 17a-19a).

The court of appeals also held that the concerns of the individual consumers in this case were within the zone of interests protected by the AMAA. The court of appeals rejected the district court's reliance on the AMAA's legislative history to determine the zone of interests arguably protected by the statute, concluding that plaintiffs are "only required to assert an interest 'which is *arguable from the face of the statute*'" (Pet. App. 22a (emphasis in original), quoting *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 142 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978)), and that the individual consumers "have clearly done this much" (Pet. App. 22a). Thus, the court of appeals not only chastised the district court for "examining the legislative history in great detail" (*id.* at 23a), but in fact declined to examine it at all. Finally, while noting that the individual consumers' asserted injury "is shared by many other persons, *i.e.*, every other cost-conscious consumer of milk" (*id.* at 25a), the court of appeals ruled that the consumers' claim was not barred as a generalized grievance (*id.* at 25a-26a).

Judge Scalia dissented in part. Judge Scalia concurred in the court of appeals' dismissal of the organizational plaintiff and the handler but concluded that the individual consumers lacked standing, and accordingly he would have affirmed the judgment of the district court in its entirety (Pet. App. 35a-44a). In his view, the consumers' interests fall outside the zone of interests arguably pro-

tected by the AMAA. Judge Scalia placed considerable weight on the fact that the individual consumers are "indirect general beneficiaries" of the AMAA (*id.* at 38a) and observed that "where there is a direct and immediate beneficiary class which can be relied upon to challenge agency disregard of the law, the claim of the indirect general beneficiaries to be congressionally designated 'private attorneys general' is weak indeed" (*ibid.*). As applied to this case, Judge Scalia thus reasoned that (*id.* at 38a-39a):

> The direct beneficiaries of milk marketing orders under the Agricultural Marketing Agreement Act (AMAA) are milk producers. * * * On the other side of the ledger, the direct beneficiaries of any limitations upon the Secretary's authority with regard to milk marketing orders are the milk handlers who pay the artificially established prices. * * * In such a situation, where the narrow class immediately affected by both agency excess and agency omission is readily identifiable, I do not believe that a more remote beneficiary class as generalized as the one here (*viz*, all consumers of fluid milk products—which cannot exclude many of the nation's households) can be found to meet the zone of interests test.

SUMMARY OF ARGUMENT

I. Respondents brought this action under the general judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* APA review is unavailable, however, when the relevant statute precludes judicial review. 5 U.S.C. 701(a)(1). Preclusion may be inferred from a statute's language, purposes, and legislative history. See, *e.g.*, *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *Barlow* v. *Collins*, 397 U.S. 159, 166-167 (1970).

The Agricultural Marketing Agreement Act of 1937 provides a detailed and specific procedure for administrative and judicial review that is available only at the be-

hest of handlers, the parties directly regulated by the market order provisions and thus the parties best situated to litigate any claim of agency excess. The legislative history demonstrates that the statutory scheme was carefully designed to balance the competing interests of handlers in having an avenue for the redress of grievances with the government's interest in uninterrupted functioning of the regulatory program. Moreover, the legislative scheme, by requiring initial presentation of handlers' challenges to the Secretary of Agriculture, ensures that the courts will have the benefit of the Secretary's expertise in adjudicating claims arising in the context of this complex regulatory statute. See *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946).

Consumer suits would effectively nullify Congress's direction that the remedy for any handler's grievance "in the first instance must be sought from the Secretary of Agriculture" (*United States* v. *Ruzicka*, 329 U.S at 294). Consumer suits would enable handlers to evade the administrative exhaustion requirement by resort to consumer "front-men"; indeed, this case vividly illustrates the potential for such abuse of the legislative scheme. Respondent Oberweis was dismissed for failure to exhaust his administrative remedies as a handler (Pet. App. 31a-33a). Yet if the consumers' suit sanctioned by the court of appeals were to proceed, Oberweis would still have his claims adjudicated without first invoking the administrative process. Since all handlers are consumers or are ultimately owned or operated by consumers, allowing consumer suits would destroy Congress's carefully balanced scheme for administrative and judicial review.

There is no reason to visit such disruption upon the legislative scheme, because the interests of consumers are entirely derivative of the interests of handlers and can be protected in handler-initiated review proceedings brought under 7 U.S.C. 608c(15). Thus, the rationale for the usual presumption in favor of reviewability—ensuring a mechanism for realization of the statutory

objectives—is absent here, because the issue is not whether judicial review is entirely foreclosed, but instead whether review at the behest of a particular plaintiff is precluded. See, *e.g.*, *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, No. 81-334 (Feb. 22, 1983), slip op. 23. When Congress has provided a comprehensive scheme for administrative and judicial review that affords an opportunity for complete resolution of a controversy, the courts should be chary of fashioning additional remedies. See, *e.g.*, *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

Finally, the interests of consumers are totally different from the "definite personal rights" of producers, rights that are "not possessed by the people generally." *Stark* v. *Wickard*, 321 U.S. 288, 304, 309 (1944) (footnote omitted). Accordingly, there is no justification for extending *Stark*'s rationale for producer-initiated suits to consumer suits. Producers are the primary beneficiaries of the AMAA, and their interests are generally antagonistic to those of handlers. Unlike consumers, therefore, producers cannot rely on the parties regulated by the statute to protect their interests, and allowing them to maintain their own suits does no violence to the Act's purposes.

II. Closely related to the question of preclusion of review is the court of appeals' erroneous conclusion that the individual consumers adequately demonstrated their standing to maintain this action. Of course, if the Court agrees with our submission that Congress intended to preclude *all* consumers from seeking judicial review of market orders, it need not reach the issue of respondents' standing. But, at minimum, examination of the language and legislative history of the AMAA clearly indicates that Congress did not intend to protect the interests asserted by the individual consumers in this litigation. In addition, respondents failed to demonstrate injury-in-

fact, they are attempting to litigate a generalized grievance shared by virtually every household in the nation, and it is entirely speculative whether any injury they might have suffered is redressable by a court.

A. Respondents' interest in lower prices for reconstituted milk is inconsistent with Congress's primary purpose in enacting the market order provision of the AMAA (7 U.S.C. 608c)—"to *raise* producer prices." S. Rep. 1011, *supra*, at 3 (emphasis added). The court of appeals nevertheless held that respondents' claim falls within the zone of interests to be protected by the AMAA because two policy provisions of the Act mention consumers (7 U.S.C. 602(2) and (4)). But the court failed to analyze the purpose of these provisions; an examination of their structure in light of the Act as a whole, coupled with analysis of the legislative history (which the court of appeals refused even to consider), demonstrates that Congress intended to protect consumers only against unwarrantably rapid or excessive price increases above the parity level. That limited protection for consumers is not implicated in this case, while the interest that respondents do assert is contrary to Congress's intent.

B. In addition to their interest in lower prices, respondents alleged that the challenged market order provisions cause them injury by depriving them of a "stabilizing market influence" that could operate to offset seasonal fluctuations in the supply of regular fluid milk. This assertion, however, fails to meet the constitutionally-required showing of injury in fact because respondents did not allege that they or any other consumers have ever been or are likely to be subjected to shortages in fluid milk supplies due to seasonal variations in milk production. This is a fatal defect. See *Warth* v. *Seldin*, 422 U.S. 490, 498-499, 504 (1975). Moreover, any such allegation would be untenable because a number of regulatory mechanisms operate to prevent seasonal fluctuations in milk production from ever affecting ultimate

consumers. Thus, there is no experience within general knowledge or subject to judicial notice of a shortage of milk at the consumer level.

C. Respondents are seeking to litigate interests shared by virtually every household in the nation, a class larger than that of all taxpayers. Such a generalized grievance is "most appropriately addressed in the representative branches" (*Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982)), particularly when the grievance is not only pervasively shared but is also entirely derivative of the direct interests of handlers, for whom Congress has provided an express right of administrative and judicial review.

D. Finally, it is entirely speculative whether the interests respondents seek to advance are redressable by a favorable judicial decision. The retail prices paid by consumers are not regulated and may bear only a marginal relationship to the prices farmers receive for their milk. Moreover, there is no indication that any reduction in handlers' costs would be passed on to consumers. Nor could a judicial decision in this case have any effect on the many intervening factors between market order pricing provisions and the ultimate availability of reconstituted fluid milk that are essential to a showing of the redressability of respondents' grievance.

ARGUMENT

I. ULTIMATE CONSUMERS OF AGRICULTURAL PRODUCTS, WHO HAVE ONLY INDIRECT AND DERIVATIVE INTERESTS IN THE AMAA'S REGULATION OF HANDLERS, MAY NOT SEEK JUDICIAL REVIEW OF AGRICULTURAL MARKET ORDERS

A. Consumer Suits Brought Under The Administrative Procedure Act Are Precluded By The AMAA

1. *Introduction.* Respondents brought this action for review of the market order provisions regulating reconstituted milk under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (see J.A. 11; Br. in Opp. 12 n.16, 15). That Act confers a general right of judicial review upon persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute" (5 U.S.C. 702), but only to the extent that the relevant statute does not preclude judicial review (5 U.S.C. 701(a)(1)). Whether or to what extent a particular statute precludes judicial review is determined not only from its express language, but also from its purpose and legislative history. See, *e.g.*, *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 457-458 (1974); *Barlow* v. *Collins*, 397 U.S. 159, 166-167 (1970). This is so because, as this Court has observed in a case arising under the AMAA, "meaning, though not explicitly stated in words, may be imbedded in a coherent scheme." *United States* v. *Ruzicka*, 329 U.S. 287, 292 (1946).

Moreover, "[a] frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National Railroad Passenger Corp.*, 414 U.S. at 458. This principle is particularly apt in the context of the present

case, in which the interests respondents seek to assert are merely derivative of the interests of handlers, the parties regulated by the market order provisions in question and the parties for whom Congress has established a "coherent scheme" (*United States* v. *Ruzicka*, 329 U.S. at 292) that provides a complete mechanism for thorough consideration of the issues respondents seek to litigate. Thus, the rationale for the usual presumption in favor of reviewability—ensuring a mechanism for realization of the statutory objectives (see *Barlow* v. *Collins*, 397 U.S. at 167)—is totally lacking in this case. Here, preclusion of consumer suits does not pose any threat to realization of the statutory objectives; instead, it means only that those objectives must be realized through utilization of the specific remedies provided by Congress, and at the behest of the parties directly affected by the statutory scheme. Such an approach is fully consistent with this Court's decisions. See, *e.g.*, *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, No. 81-334 (Feb. 22, 1983), slip op. 23; *Morris* v. *Gressette*, 432 U.S. at 505-507 & n.21; *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 746 (1977); *Barlow* v. *Collins*, 397 U.S. at 175 n.9 (Brennan, J., concurring and dissenting); *United States* v. *Ruzicka*, 329 U.S. at 293-294; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 300-301 (1943).

With these principles in mind, we demonstrate below that congressional intent to preclude consumer attacks on market orders is necessarily found in the AMAA's express provision for judicial review only at the behest of handlers, the parties Congress intended to serve as the direct representatives of the interests respondents assert in this case. This conclusion is reinforced by the disruptive effect that unauthorized consumer actions would have on Congress's carefully crafted scheme for the regulation of agricultural commodities under the AMAA.

2. ***The AMAA establishes a special statutory review proceeding available only to handlers.*** Judicial review of

market orders issued under the AMAA is, by the terms of the Act itself, available only to handlers regulated by those orders.[9] The Act is explicit and precise in specifying the procedures to be followed by handlers challenging a market order. First, pursuant to 7 U.S.C. 608c(15)(A), a handler must file a written petition with the Secretary. The Secretary must then provide the handler with an opportunity for a hearing, to be conducted in accordance with the Secretary's regulations. Those regulations (7 C.F.R. 900.50-900.71) provide that handler petitions are to be resolved in formal, adjudicatory proceedings before an administrative law judge (see Pet. App. 40a-44a (Scalia, J., concurring and dissenting)). At the conclusion of the formal administrative proceedings, a handler may obtain judicial review of the Secretary's ruling in any federal district court "in which such handler is an inhabitant, or has his principal place of business" (7 U.S.C. 608c(15)(B)). The pendency of handler-initiated review proceedings under 7 U.S.C. 608c(15) "shall not impede, hinder, or delay" the Secretary of Agriculture from obtaining relief to enforce his orders pursuant to 7 U.S.C. 608a(6) (7 U.S.C. 608c(15)(B)).

Congress gave careful consideration to competing interests when it drafted these provisions for administrative and judicial review at the behest of handlers. As originally enacted in 1933, the AAA contained no provisions relating to administrative or judicial review whatsoever. When the AAA was amended in 1935, however, Congress added the special review and enforcement provisions described above. As explained in the legislative history, these provisions were intended to strike an appropriate balance between handlers' interests in having an avenue for review and the government's interest in uninterrupted functioning of the program (S. Rep. 1011, *supra*, at 14 (emphasis added)):

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[9] The limited circumstances under which producers may obtain judicial review of market orders, discussed at pages 30-32, *infra*, have no bearing on this case.

> Specific provision is made for administrative and judicial review of orders. No similar provision is contained in the present act. * * *
>
> During the period while any such petition [for review of an order] is pending before the Secretary and until notice of the Secretary's ruling is given to the petitioner, the penalties imposed by the act for violation of an order cannot be imposed upon the petitioner if the court finds that the petition was filed in good faith and not for delay. The Secretary may, nevertheless, during this period, proceed to obtain an injunction against the petitioner pursuant to section 8a(6) of the Agricultural Adjustment Act. * * * *It is believed that these provisions establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms.*

The statutory review and enforcement provisions thus comprise a complete and rounded scheme in which the interests of regulated parties and the interests of the government are simultaneously protected. Given the obvious care taken by Congress in balancing these competing interests, it could not have intended to sanction additional remedies that would upset the statute's delicate balance. See *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

3. *Sound policy reasons support the conclusion that Congress intended the statutory scheme for administrative and judicial review to be exclusive.* Congress had sound reasons for concluding that attacks on market orders should be considered by the Secretary in the first instance. The questions raised in such attacks are often complex, and their resolution requires an intimate knowledge of the economic and technical factors underlying the marketing of the various agricultural products subject to regulation—*e.g.*, milk, nuts, fruits, vegetables, and hops (7 U.S.C. 608c(2)). The courts have consistently recognized that the AMAA and the market orders issued thereunder create a highly complex and labyrinthian reg-

ulatory scheme. See, *e.g.*, *Zuber* v. *Allen*, 396 U.S. at 172; *Suntex Dairy* v. *Block*, 666 F.2d 158, 166 (5th Cir. 1982), cert. denied, No. 81-2098 (Oct. 4, 1982); *Dairylea Cooperative, Inc.* v. *Butz*, 504 F.2d 80, 82 (2d Cir. 1974); *Blair* v. *Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966); *Queensboro Farms Products, Inc.* v. *Wickard*, 137 F.2d 969, 975 (2d Cir. 1943). It is thus not surprising that "[a] court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing" (*Blair* v. *Freeman*, 370 F.2d at 232); as the court explained in *Queensboro Farms Products, Inc.* v. *Wickard*, 137 F.2d at 975:

> The milk problem is so vast that fully to comprehend it would require an almost universal knowledge ranging from geology, biology, chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government. It affects an industry immense in scope, for dairying is said to be the largest single branch of agriculture in this country with the exception of that of raising livestock for slaughter, the annual money value of dairy products running to billions of dollars.

Congress thus clearly understood that, before judicial intervention is sought, these complex questions must be presented to the Secretary, who possesses the requisite expertise to illuminate and resolve them.[10]

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[10] In *United States* v. *Lamars Dairy, Inc.*, 500 F.2d 84 (7th Cir. 1974), the court refused to permit handlers to bypass the statutory exhaustion requirement. Referring to a series of cases in which another court had temporarily allowed handlers to avoid the statutory scheme, the court observed (*id.* at 86):

> The *Brown* cases illustrate the folly of deviating from the statutory enforcement scheme under the [Act]. The same district judge who had so many doubts as to the applicability of the Act to defendants became totally convinced defendants were handlers, once he had the benefit of the Secretary's opinion. Meanwhile, years passed without defendants' paying into the fund.

This Court recognized the importance of judicial deference to the Secretary's expertise in *United States* v. *Ruzicka, supra.* In rejecting an attempt by a handler to attack for the first time the validity of a milk market order as a defense to a judicial enforcement proceeding brought by the Secretary, the Court stressed the purposes of the statutory review provisions (329 U.S. at 294):

> Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of his rulings, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts.[11]

The importance of "elucidation" by an expert administrative body is heightened by the vast scope of the regulatory program at issue. The Department of Agriculture advises us that the value of milk handled under the various market orders exceeds an average of $1 billion each month. Moreover, it would seem that the court of appeals' ruling would logically extend to market orders covering other agricultural products. In addition to the 45

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[11] The lower courts have been equally scrupulous in requiring handlers to exhaust the statutorily-prescribed administrative remedy. See, *e.g., Navel Orange Administrative Committee* v. *Exeter Orange Co.*, Nos. 82-4333 and 82-4548 (9th Cir. Nov. 15, 1983); *United States* v. *United Dairy Farmers Cooperative Ass'n*, 611 F.2d 488 (3d Cir. 1979); *United States* v. *Lamars Dairy, Inc.*, 500 F.2d 84 (7th Cir. 1974); *Willow Farms Dairy, Inc.* v. *Benson*, 276 F.2d 856 (4th Cir. 1960); *United States* v. *Ideal Farms, Inc.*, 262 F.2d 334 (3d Cir. 1958); *Panno* v. *United States*, 203 F.2d 504 (9th Cir. 1953); *United States* v. *Turner Dairy Co.*, 166 F.2d 1 (7th Cir.), cert. denied, 335 U.S. 813 (1948); *La Verne Co-op. Citrus Ass'n* v. *United States*, 143 F.2d 415 (9th Cir. 1944).

milk market orders, there are at present 47 market orders regulating such varied commodities as citrus fruits, potatoes, pears, tomatoes, walnuts, dates, and hops. See, *e.g.*, 7 C.F.R. Pts. 905, 910, 911, 931, 945, 965, 984, 987, and 991. Approximately $6 billion worth of fruits, vegetables, and specialty crops were handled under these orders in 1982. Each order deals with the peculiarities of the marketing of the specific commodity regulated in the geographic region covered by the order. The regulation of these commodities is so complex that some orders require adjustments to be made as often as once a week during the marketing season. See, *e.g.*, 7 C.F.R. 907.51, 907.52. The decision below would make the federal courts, acting without benefit of the Secretary's expertise, the arbiters of all the varied and complex regulatory issues that arise under the orders, thereby raising the possibility that the courts could inadvertently cause the very economic chaos that Congress sought to remedy when it enacted the AMAA.[12] Such a result should not be attributed to Congress absent clear and persuasive indication that Congress actually intended it.[13]

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[12] As the court observed in *Blair* v. *Freeman*, 370 F.2d at 232, "[a]ny court is chary lest its disarrangement of such a regulatory equilibrium [under the AMAA] reflect lack of judicial comprehension more than lack of executive authority."

[13] Presumably, it would be within a court's power to secure the benefit of the Secretary's expertise by invoking the doctrine of primary jurisdiction and staying its hand pending the Secretary's consideration of a regulatory issue arising under the AMAA. See, *e.g.*, *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973). But there is no warrant for resort to the judge-made doctrine of primary jurisdiction when Congress itself already has specified the precise manner in which agency expertise is to be brought to bear on challenges to the AMAA's regulation of handlers. In these circumstances, invocation of primary jurisdiction, while perhaps necessary as an aid to judicial decisionmaking, would only highlight the underlying flaw in permitting unregulated ultimate consumers to litigate challenges that Congress intended to be brought by

In addition to the need for administrative expertise, Congress had another reason for making the statutorily-prescribed handler review provisions exclusive. As this Court stressed in *United States* v. *Ruzicka*, 329 U.S. at 293, Congress was equally concerned about the disruptive potential of premature litigation:

> Failure by handlers to meet their obligations promptly would threaten the whole [regulatory] scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements. To make the vitality of the whole arrangement depend on the contingencies and inevitable delays of litigation, no matter how alertly pursued, is not a result to be attributed to Congress unless support for it is much more manifest than we here find. That Congress avoided such hazards for its policy is persuasively indicated by the procedure it devised for the careful administrative and judicial consideration of a handler's grievance.

Preventing handlers' litigious noncompliance with market orders is essential to the operation of the program.[14]

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handlers under the provisions of 7 U.S.C. 608c(15). Moreover, the primary jurisdiction doctrine would not be a complete solution to the problems that would be caused by bypassing the congressionally-mandated review procedures. As discussed below (see pages 24-25, *infra*), Congress intentionally denied handlers the right to seek interim judicial relief that would interrupt the smooth functioning of the program. Consumer suits brought under the APA, on the other hand, would be subject to no such restrictions, thus enabling consumers to obtain for handlers the very remedies that Congress prohibited handlers from seeking for themselves.

[14] The requirement that handlers pay for milk according to its end use is affirmatively mandated by the Act (7 U.S.C. 608c(5)), as is the payment to farmers of a uniform price irrespective of the uses to which the milk is put by handlers (*ibid.*). To accomplish these statutory directives, handlers make their payments for milk into regional producer settlement funds that are then distributed to farmers (see Pet. App. 3a-4a). The successful operation of the

The Act explicitly contemplates the application of market orders to handlers who have disapproved them (see page 7, *supra*) and likely believe the orders to be contrary to their interests; indeed, the Department of Agriculture advises us that handlers have not agreed to any milk market order since 1941. The importance Congress attached to the government's ability to obtain compliance through enforcement actions even during the pendency of handler-initiated challenges to market orders (7 U.S.C. 608c(15)(B)) is thus apparent.

4. *Consumer attacks on market orders would effectively obliterate Congress's carefully balanced scheme for their review and enforcement.* On only one occasion prior to the filing of this suit have consumers attempted to challenge a market order, and that challenge was rejected on precisely the grounds that we urge here. In *Rasmussen* v. *Hardin*, 461 F.2d 595 (9th Cir.), cert. denied, 409 U.S. 933 (1972), the court held that consumers of a filled milk product were precluded from seeking review of milk market order provisions that effectively raised the price of the product in the same manner that the market order provisions at issue in this case may raise the price of manufacturer reconstituted fluid milk. The court held that " 'clear and convincing evidence' " of an intent to preclude review by consumers could be " 'inferred from [the statutory] purpose' " (*id.* at 599 (quoting *Barlow* v. *Collins*, 397 U.S. at 166-167)). The court went on to explain (461 F.2d at 599-600):

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settlement funds is extremely sensitive to the slightest disturbance and, as a practical matter, is directly dependent upon prompt compliance by all handlers. The default of a single handler causes an immediate breach in the equalization of costs to handlers and a reduction in price to farmers. The unfair advantage gained by a defaulting handler is sufficient to constitute a strong inducement to competitors to make similar defaults. Any impediment to the Secretary's ability to enforce immediate compliance could result in insufficient funds to provide farmers with the income protection Congress intended for them, and so destabilize the nation's fluid milk supply.

> The statute before us does more than provide for administrative and judicial review and name the affected class entitled to seek it. Section 608a(6) provides for enforcement of the Secretary's orders. And Section 608c(15)(B) provides that pendency of administrative or judicial review under that section "shall not impede, hinder, or delay the United States or the Secretary . . . from obtaining relief pursuant to section 608a(6) . . ." It was this language that led the Court to hold, in *Ruzicka*, that grounds for attacking an order under § 608c(15) could not be raised in a § 608a(6) proceeding.
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> * * * * *
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> To grant consumers standing would be to say that, while Congress regarded it as imperative that a challenge by a *handler* who is directly regulated by a marketing order, first be considered by the Secretary, it was nevertheless the legislative judgment that if advanced by consumers, the same challenge did not require initial scrutiny by the administrative body. There is no basis for attributing to Congress the intent to draw such a distinction. Had Congress intended to allow consumers to attack provisions of a marketing order, it would have required them to pursue the administrative remedy provided in Section 608c(15)(A). By limiting the administrative remedy to handlers, Congress necessarily intended that the judicial remedy be similarly limited in scope.

The Ninth Circuit also noted that consumer suits would be particularly anomalous because they would enable handlers to evade the statutory exhaustion requirement by latching on to consumer "front-men." *Rasmussen* v. *Hardin*, 461 F.2d at 600. This case vividly demonstrates the potential for such abuse of the legislative scheme. Respondent Oberweis, a handler, was dismissed for failure to exhaust his administrative remedies (Pet. App. 31a-33a, 66a-67a). But if the court of appeals' decision to allow the individual consumers to maintain this action stands, Oberweis will still have his claims adjudicated

without first invoking the administrative process. Indeed, it would not be at all surprising if Oberweis were a "cost-conscious consumer," as well as a milk handler, and the decision below would appear to allow for amendment of the complaint to add Oberweis in his new-found capacity as a consumer plaintiff. Cf. *Reade* v. *Ewing*, 205 F.2d 630, 631-632 (2d Cir. 1953). Since even corporate handlers are ultimately owned or operated by consumers, it is readily apparent that the decision below effectively eviscerates the congressionally-mandated restrictions on handlers' actions. No handler need ever again present his grievances to the Secretary even though "Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture" (*United States* v. *Ruzicka*, 329 U.S. at 294). Moreover, consumers or consumer-handlers could seek injunctions against the operation of market orders that "impede, hinder, or delay" enforcement actions even though such injunctions are expressly prohibited in proceedings properly instituted under 7 U.S.C. 608c(15). Thus, consumer suits would effectively nullify Congress's intent, recognized by this Court in *Ruzicka* (329 U.S. at 293-294 & n.3), to "establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." S. Rep. 1011, *supra*, at 14. It is therefore essential to the legislative scheme that 7 U.S.C. 608c(15) remain the exclusive vehicle for testing the validity of market order restrictions imposed on handlers.[15]

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[15] Respondents' petition for a rulemaking hearing (see page 9 note 7, *supra*) is no substitute for the administrative procedures mandated by the statute and available only to handlers. As the court of apepals noted (Pet. App. 33a (emphasis in original)), the complaint in this case "challenge[s] the Secretary's authority to *adopt* the compensatory payment regulation *in the first place*; [the] complaint did *not* attack his subsequent refusal to correct that alleged wrong." Thus, the issues raised in the lawsuit were *not* decided by the Secretary's denial of the petition for a rulemaking hearing. Moreover, as explained by Judge Scalia (*id.* at

This Court has expressly disapproved of analogous efforts to frustrate carefully constructed congressional schemes for orderly administrative and judicial review. See, *e.g.*, *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 21 (additional remedy against a different defendant precluded where Congress has created "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations"); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement"); *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375-376 (1979) ("If a violation of Title VII could be asserted through § 1985(3), * * * the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII"); *Brown* v. *GSA*, 425 U.S. 820, 832-833 (1976) ("The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. * * * Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible.").

Sanctioning consumer suits under the APA frustrates the "careful blend of administrative and judicial enforcement powers" (*Brown* v. *GSA*, 425 U.S. at 833) in a "detailed and specific" statutory scheme (*Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 644

41a-44a), the administrative proceeding required by 7 U.S.C. 608c(15)(A) as a prerequisite to judicial review is an entirely different type of proceeding from the informal rulemaking hearing that respondents sought.

(1981)) that is "supervised by an expert administrative agency" (*City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981)). Thus, judicial review of market orders issued under the AMAA must be confined to suits brought by handlers in accordance with 7 U.S.C. 608c(15).

5. *Consumers' indirect interests may be adequately protected through handler-initiated review proceedings brought under 7 U.S.C. 608c(15).* The absence of a right of judicial review for consumers does not mean that their interests (to the extent they are protected by the AMAA at all (see pages 34-43, *infra*)) will go unprotected. Instead, handlers are perfectly well situated to promote the indirect interests of consumers in market orders at the same time that they assert their own direct interests in regulations directly applicable to themselves. This Court has noted that handlers "seek only to obtain reliabl[e supplies of] milk at the cheapest price." *Zuber* v. *Allen*, 396 U.S. at 190. That consumer interests are truly derivative of handler interests—consumers complain that they pay more because handlers pay more—is shown by the fact that handlers and consumers asserted identical claims both in the instant case and in *Rasmussen* v. *Hardin*, *supra*. See Pet. App. 39a-40a (Scalia, J., concurring and dissenting). Whether handlers would pass on to consumers any cost savings they might secure through a successful challenge to the market order provisions in question is entirely speculative (see pages 46-49, *infra*), but, in any event, consumers' interest in market orders is limited to lowering the prices charged to handlers in the hope that consumers will then reap some benefit at the retail level. Thus, the interests of handlers and consumers in market orders are, from the standpoint of consumers, virtually identical.[16]

This identity of interests makes it unnecessary and inappropriate to grant consumers a right of direct review.

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[16] To the extent that consumers seek assurances of adequate supplies of milk, that objective, while possibly in conflict with their interest in lower prices, is also an objective of handlers. See *Zuber* v. *Allen*, 396 U.S. at 190.

See *Associated General Contractors of California, Inc.*, slip op. 23 (footnote omitted) ("The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general. Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.").

B. The Rationale For Inferring A Right Of Judicial Review At The Behest Of Producers, The Direct Beneficiaries Of The AMAA, Does Not Extend To Ultimate Consumers

The court of appeals concluded (Pet. App. 27a n.75) that preclusion of review at the behest of ultimate consumers could not be inferred from the AMAA's failure to mention consumer suits because the Act also is silent on the subject of producer suits, yet this Court authorized producers to challenge the administration of a milk market order fund in *Stark* v. *Wickard*, 321 U.S. 288 (1944). But that case is plainly distinguishable and lends no support to the court of appeals' decision here. In *Stark*, milk producers challenged certain deductions that were made from the "producer settlement fund" established in connection with a milk market order. In granting standing to the producers, even though Congress failed to give them an express administrative remedy or the right to judicial review, the Court pointed out that they had a proprietary interest in the fund, and that it "is because every dollar of deduction comes from the producer that he may challenge the use of the fund" (321 U.S. at 308). The Court also noted that the statute gives producers "definite personal rights," rights that are "not possessed by the people generally" (*id.* at 304, 309 (footnote omitted)).[17]

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[17] The lower courts have allowed producers to challenge market orders in analogous circumstances. See, *e.g.*, *Walmsley* v. *Block*,

Stark thus does no more than recognize that producers are the primary beneficiaries of the regulatory scheme. See *Zuber* v. *Allen*, 396 U.S. at 180-181; *Schepps Dairy, Inc.* v. *Bergland*, 628 F.2d 11, 22 (D.C. Cir. 1979); *Suntex Dairy* v. *Bergland*, 591 F.2d 1063, 1067 n.3 (5th Cir. 1979); *Rasmussen* v. *Hardin*, 461 F.2d at 599. Moreover, producers are the only segment of society to which Congress gave a veto power over the adoption and retention of market orders. See 7 U.S.C. 608c(8), (9) and (16)(B); *Schepps Dairy, Inc.* v. *Bergland*, 628 F.2d at 22; *Suntex Dairy* v. *Bergland*, 591 F.2d at 1067. As the court noted in *Suntex Dairy*, 591 F.2d at 1067 n.3, producers and consumers stand on very different ground:

> We find the generalized interests of consumers in a marketing order totally different from the interests of producers. The statute goes to great lengths to guard the interests of producers by providing for administrative hearings and a ratification referendum. No such Congressional deference was shown consumers.

In addition, the interests of producers and handlers are generally antagonistic (see, *e.g.*, *Zuber* v. *Allen*, 396 U.S. at 173-174 & n.4; 79 Cong. Rec. 9490 (1935)), and thus producers, unlike consumers, cannot rely on handler-initiated review proceedings to protect their interests. Finally, as recognized in *Stark*, the regulatory framework often requires the Secretary to hold, allocate, and distribute funds that belong to producers. In such circumstances, it would be anomalous to conclude that Congress meant to foreclose all producer challenges to the market order program; indeed, Congress appears to have con-

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719 F.2d 1414 (8th Cir. 1983); *Suntex Dairy* v. *Bergland*, 591 F.2d 1063 (5th Cir. 1979); *Blair* v. *Freeman*, *supra*; *Dairylea Cooperative, Inc.* v. *Butz*, *supra*. In all of these cases, as in *Stark*, the producers alleged direct injury in the form of a reduction in revenues that the AMAA was intended to provide for them. In contrast to consumer suits, therefore, producer suits do not thwart the basic purposes of the statute, and there is accordingly no basis for inferring a congressional intent to preclude them.

templated producer suits even though it did not authorize them expressly. See 79 Cong. Rec. 9479 (1935). By contrast, we have found no mention of consumer suits in the legislative history and debates, thus confirming the fact that consumers are simply outside the regulatory scheme and that Congress did not intend to permit them to upset it through litigation.[18]

II. RESPONDENTS FAIL TO SATISFY THE CONSTITUTIONAL AND PRUDENTIAL REQUIREMENTS OF THE STANDING DOCTRINE

Assuming arguendo that Congress did not preclude *all* consumer suits under the AMAA, nevertheless the court of appeals erred in concluding that the consumer respondents in this case have standing to maintain their challenge to the market order provisions at issue. The various elements of the standing doctrine were thoroughly set forth in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). There the Court held that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the

[18] It is also worth noting that the disruptive potential arising out of producer suits such as that authorized in *Stark* is far less than the disruption likely to be caused by consumer suits of the type sanctioned by the decision below. Milk market orders only become effective with the agreement of at least two-thirds of the affected producers (see page 7, *supra*), and only remain in effect so long as a majority of producers continue to approve of them (see 7 U.S.C. 608c(16)(B)). Thus, producer suits challenging such orders will be relatively infrequent. Producer suits also are ordinarily limited to challenges to individual market orders. Consumers, on the other hand, could conceivably assert an "interest" in challenging every market order because, by legislative design, they would have played no formal role in devising the orders; moreover, as in this case, consumers could attack market orders nationwide, thus greatly increasing the disruptive potential of litigation.

challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)." *Valley Forge*, 454 U.S. at 472 (footnote omitted). In addition, the Court has adhered to a number of prudential considerations bearing on the question of standing. Thus, "the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches" (*id.* at 475) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975)). And "the Court has required that the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question'" (*Valley Forge*, 454 U.S. at 475) (quoting *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970)). The consumer respondents fail to satisfy these requirements.

Respondents alleged two injuries in their complaint. First, they claimed that the market orders deprive them of a nutritious, low-cost substitute for regular fluid milk. Second, they claimed that by making reconstituted fluid milk uneconomical for handlers to produce, the orders deprive consumers of a "stabilizing market influence" that could operate to offset seasonal fluctuations in the supply of regular fluid milk.[19] Respondents' first asserted injury

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[19] Specifically, respondents described their alleged injuries as follows (J.A. 16, 17):

> 28. The economic barriers to marketing reconstituted milk created by the existing Orders deprive plaintiffs Weinberg, Harrel, and Desmarais and other consumers of access to a nutritious dairy beverage at a lower price than fresh drinking milk.
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> * * * * *
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> 31. The existing Orders deprive producers and consumers of a stabilizing market influence. A reconstituted fluid product could quickly expand the fluid milk supply when seasonable changes result in a reduction of the whole fluid milk supply. Tight fluid markets and rising fluid prices could be avoided and the size of the reserve fresh whole Grade A milk needed to provide the fluid market could be reduced if such adjustments were possible.

lies outside the zone of interests arguably protected by the AMAA, while the second asserted injury fails to satisfy the constitutional requirement of injury in fact. Moreover, the complaint as a whole fails to satisfy the Article III requirement of redressability and the prudential prohibition against the litigation of generalized grievances.

A. Respondents' Interest In A Lower Price For One Type Of Fluid Milk Is Outside The Zone Of Interests Protected By The AMAA

Respondents' allegation that the market order provisions at issue deprive them of a low-cost substitute for regular fluid milk fails to satisfy the zone of interests requirement. The primary purpose of the AMAA is to protect dairy farmers; [20] the express purpose of the market order provision (7 U.S.C. 608c) is "to *raise* producer prices." S. Rep. 1011, *supra*, at 3 (emphasis added). Thus, as the Ninth Circuit noted in *Rasmussen* v. *Hardin*, 461 F.2d at 599, consumers' interests in lower prices not only are not within the scope of Congress's concern, but are actually contrary to the legislative design. See 79 Cong. Rec. 9471 (1935).

The court below totally disregarded Congress's purpose in enacting the AMAA when it held that consumers' interests in lower prices for reconstituted fluid milk fall within the Act's zone of interests. The court of appeals' error was twofold—first, it relied on isolated statutory references to consumers that, when analyzed, do not support the court's conclusion, and, second, it eschewed any

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[20] Confirmation of Congress's solicitude for farmers is apparent from the Act's requirement that at least two-thirds of the dairy farmers in an affected region must approve a proposed market order before it may take effect (7 U.S.C. 608c(8)). This requirement operates even in the face of opposition from affected handlers if "such order is the only practical means of advancing the interests of the producers" (7 U.S.C. 608c(9)(B)). Moreover, if producers become dissatisfied with an order they, unlike handlers, may require the Secretary to terminate it (7 U.S.C. 608c(16)(B)).

resort to the legislative history to elucidate the statute's meaning.

1. The court of appeals' conclusion on the zone of interests issue rested on two policy sections of the AMAA that merely reference consumers. First, the court cited 7 U.S.C. 602(2), which provides that it is the policy of Congress:

> [t]o protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

It is difficult to understand how this section's reference to consumers supports the result reached by the court of appeals. In the quoted section, Congress called upon the Secretary to *increase* prices as rapidly as the public interest would permit; it acted to protect the interest of consumers only to the extent that that interest was consistent with the pricing policy for farmers established in 7 U.S.C. 602(1). That section's declared policy is to establish parity prices for farmers. As the court of appeals itself noted, 7 U.S.C. 602(2) "expresses Congress' intent to protect consumers against *unwarrantably rapid or excessive* price increases by limiting the Secretary's authority to fix prices at parity and no higher" (Pet. App. 20a (emphasis added; footnote omitted)). Clearly, that legislative intent has nothing to do with respondents' asserted interest in *lowering* prices for reconstituted fluid milk.[21]

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[21] The Department of Agriculture advises us that throughout the entire history of the AMAA, the blend prices paid to producers

The court of appeals also relied on 7 U.S.C. 602(4), which expresses a policy of protecting producers and consumers against "unreasonable fluctuations in supplies and prices." See Pet. App. 22a-23a. Again, this section does not support the consumer respondents' asserted interest in *lower* prices; and respondents have never alleged that the challenged market order provisions subject them to unreasonable *fluctuations* in prices.[22]

The statutory references to consumers, therefore, are insufficient to bring the asserted interests of the consumer respondents in this case within the zone of interests to be protected by the AMAA. Careful analysis of the statutory sections themselves, erroneously eschewed by the court of appeals, reveals that lower prices for consumer products were simply not an interest that Congress acted to protect. And, as the district court noted (Pet. App. 63a-64a), "[n]either the question of price increases nor the issue of parity pricing is implicated in this case."

2. Equally important, the court of appeals plainly erred in disregarding the statute's legislative history (Pet. App. 21a-23a). As this Court has recognized, " 'there certainly can be no "rule of law" which forbids [reference to legislative history], however clear the words may appear on "superficial examination." ' " *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) (quoting *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543-544 (1940)). Here, "superficial examination" of the statute does indeed show that "consumers" are mentioned in the Act; but closer analysis of the legislative history demonstrates that the

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under the market orders have rarely, if ever, reached parity. For at least the last several years, the blend prices paid under all orders have been below parity. Thus, even the limited protection that Congress may have intended for consumers is not implicated by the realities of the regulatory program.

[22] Respondents have made loose allegations concerning fluctuations in the *supply* of milk. As we demonstrate below, however, those allegations are insufficient to establish standing in this case (see pages 43-45, *infra*).

interests asserted by the consumers in *this* litigation were never within the contemplation of Congress. While resort to legislative materials may not always be necessary, it is surely erroneous to require that a court avert its gaze from legislative history demonstrating that arguable inferences from the face of the statute are manifestly at odds with the meaning Congress intended to convey by the words it used.[23]

As previously noted, the legislative history of the

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[23] The court of appeals refused to examine any legislative history in its consideration of the zone of interests test in reliance on its earlier decision in *Tax Analysts & Advocates* v. *Blumenthal*, *supra* (Pet. App. 22a). There the court concluded that "full-scale examination of legislative history" (566 F.2d at 141) should be avoided in applying the zone of interests test because (1) it could lead to a premature judgment on the merits, (2) the legislative history is not likely to be illuminating on the zone of interests question, and (3) full scale examination of the legislative history could undermine the "generous" nature of the zone test. *Id.* at 141-142. While we question the validity of any rule of interpretation that requires a court to eschew examination of pertinent legislative history, we note that the court in *Tax Analysts* did not purport to create an absolute rule. Instead, the court stated (*id.* at 143 n.80 (emphasis in original)):

> We do not rule out *any* role for legislative history at this stage, and we would expect to be informed by the parties if the legislative history contained clear evidence of an intent either to allow the appellant's interests as a basis for standing or to deny standing to a party in this position.

Even this limited acknowledgment of the pertinence of legislative history is, we submit, too narrow, but it is worth noting that in subsequent cases the District of Columbia Circuit has in fact examined the relevant legislative history in applying the zone of interests test. See, *e.g.*, *American Friends Service Committee* v. *Webster*, 720 F.2d 29, 55-57 (D.C. Cir. 1983); *Copper & Brass Fabricators Council, Inc.* v. *Dep't of the Treasury*, 679 F.2d 951, 952-953 (D.C. Cir. 1982); *Control Data Corp.* v. *Baldrige*, 655 F.2d 283, 294-296 & nn.23-25 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981). Other circuits also examine the pertinent legislative history when applying the zone test. See, *e.g.*, *Peoples Gas, Light & Coke Co.* v. *United States Postal Service*, 658 F.2d 1182, 1195-1196 (7th Cir. 1981); *In re Swearingen Aviation Corp.*, 605 F.2d 125, 126-127 (4th Cir. 1979). This Court did likewise in *Barlow* v. *Collins*, 397 U.S. at 164-165 & n.7.

AMAA clearly reveals that the essential purpose of market orders is "to raise producer prices." S. Rep. 1011, *supra*, at 3; see also H.R. Rep. 1241, 74th Cong., 1st Sess. 7 (1935); S. Rep. 548, 74th Cong., 1st Sess. 3 (1935); H.R. Rep. 952, 74th Cong., 1st Sess. 2 (1935). The legislative history of the statute as originally enacted in 1933 explains Congress's view that raising producer prices would benefit consumers as well as farmers (H.R. Rep. 6, 73d Cong., 1st Sess. 7 (1933)):

> In the long run, consumers can not expect to buy any product at a price which represents less than a fair return to the labor and capital involved in producing the commodity. The ultimate danger to the consumer in the present extremely low prices for agricultural products is that, if continued, they will shortly result in the ruin of our agriculture and it will eventually be necessary to pay unduly higher prices before it can be restored. The consumer as well as the farmer and the business man has everything to gain from a fair and balanced relationship between production and consumption that will restore to agricultural commodities their pre-war purchasing power. The present economic emergency is in large part the result of the impoverished condition of agriculture and the lack of ability of farmers to purchase industrial commodities.[24]

When it amended the AAA in 1935, Congress enacted what is now 7 U.S.C. 602(2), one of the two statutory provisions mentioning consumers and relied upon by the court of appeals. The legislative history of that section makes plain that the safeguards Congress intended for consumers were to extend no further than protecting them against price increases above the parity level (H.R. Rep. 1241, *supra*, at 3 (emphasis added)):

> Subsection (3) of the "Declaration of policy" contained in the present act [the AAA], which was in-

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[24] See also 79 Cong. Rec. 9460 (1935) ("These increased prices were necessary to restore the purchasing power of the farmer in the interest of the common welfare of the country"); 79 Cong. Rec. 9594-9595, 9608, 9610 (1935) (same).

> serted in order to protect consumers against unwarrantably rapid or excessive price increases, is ambiguously worded and has met with some criticism from the courts as being a vague and unintelligible standard, from which the Secretary can derive no adequate guide in the exercise of his powers. *This language has, accordingly, been reworded to make it clear that the act confers no authority upon the Secretary to utilize his powers in order to maintain farm prices above the parity level.*

In short, the legislative history of Section 602(2) confirms the plain reading of the statutory language, which itself demonstrates that consumers' interest in lower prices was not an interest Congress meant to protect.

To an even greater extent, the same is true of 7 U.S.C. 602(4), the other statutory provision that references consumers. As pointed out in the "undeniably thorough" analysis by the district court (Pet. App. 22a), Section 602(4) was enacted in 1954 as an amendment to the AMAA, in response to totally different problems from those addressed by Congress in 1935 (Pet. App. 62a-63a (emphasis added)):

> The 1954 amendments were enacted to counter the falling farm prices caused by the surplus of commodities after the Korean Conflict. H.R. Rep. No. 1927, 83rd Cong., 2d Sess., *reprinted in* [1954] U.S. Code Cong. & Ad. News 3399, 3401. The amendments dealt primarily with price supports and parity pricing. *Id.* at 3399-3400. The House Report on the Act made it clear that the interests of consumers were being taken into account in dealing with these issues. This concern was expressed in terms of the importance of price stability, *id.* at 3407, and abundance of supply. *Id.* at 3402. The Report also makes it clear that farm prices are in large measure independent of the prices consumers pay. *Id.* at 3404.
>
> Nowhere in the House Report is the interest of consumers mentioned in relation to Orders regulating commodities. Indeed, the Orders are not even a sig-

nificant part of the 1954 Act. *The comments on consumers in the legislative history seem primarily aimed at dispelling the misconception that the flexible price-support program embodied in the bill would materially lower consumer prices. See* House Report, *supra*, at 3404.

The district court was clearly correct in its analysis of Section 602(4). The Senate Report explains that the section (S. Rep. 1810, 83d Cong., 2d Sess. 8 (1954))

> would authorize the continuous operation of marketing agreements and orders, even though prices might be above parity, if necessary to provide an orderly flow to market throughout the marketing season without unreasonable fluctuations in supplies and prices. At present programs must be discontinued when the parity objective is achieved.

See also H.R. Rep. 2664, 83d Cong., 2d Sess. 24 (1954). In essence, then, Section 602(4) was intended to *reduce* the already limited price protection for consumers provided in Section 602(2) by authorizing the Secretary to establish market order prices *above* parity in order to maintain orderly marketing conditions. The legislative history thus reinforces the conclusion that the AMAA's references to consumers, even if meant to be more than "pious platitudes" (*Rasmussen* v. *Hardin*, 461 F.2d at 599), were never intended to advance the goals asserted by respondents in this litigation.

3. The zone of interests test serves an essential function in the demarcation of the proper roles for courts and legislatures. The prudential limitations on standing, including the zone test, stem from "concerns 'about the proper—and properly limited—role of the courts in a democratic society.'" *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978) (quoting *Warth* v. *Seldin*, 422 U.S. at 498). As the Court has explained (*id.* at 500):

> Without such [prudential] limitations—closely related to Art. III concerns but essentially matters of

> judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions * * *.

Similarly, the District of Columbia Circuit has recognized that one function of the standing doctrine is "to define the proper judicial role relative to the other major governmental institutions in the society." *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d at 139 (footnote omitted). See generally *Valley Forge*, 454 U.S. at 472, 473-474. The zone test is particularly well suited to that purpose (*Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d at 140 (footnote omitted)):

> The zone test, by its very language, implicates the relationship between the legislative and judicial branches as the predominant factor in its operation—"the zone of interests to be protected or regulated by the *statute* . . . in question." Thus, the zone test serves the purpose of allowing courts to define those instances when it believes the exercise of its power at the instigation of a particular party is not congruent with the mandate of the legislative branch in a particular subject area.

In the present case, there can be no doubt that the exercise of judicial power at the instigation of the consumer respondents is "not congruent with the mandate" of Congress as embodied in the AMAA. To the extent respondents are dissatisfied with the purposes of the AMAA and believe that the Act should be altered to give greater weight to their interests, respondents have a remedy, but it lies with Congress rather than with the courts. The courts overstep their "properly limited" role when they undertake to resolve grievances that stem from dissatisfaction with choices made by Congress in the exercise of its legislative judgment. The zone of interests test is properly employed, therefore, to deny standing to parties

seeking to advance interests that are inconsistent or incongruent with the interests Congress intended to promote[25] (see, *e.g.*, *Copper & Brass Fabricators Council, Inc.* v. *Dep't of the Treasury*, 679 F.2d at 953; *Control Data Corp.* v. *Baldrige*, 655 F.2d at 295), or that go further than the limited protection that Congress may have intended for a particular interest (see, *e.g.*, *Rodeway Inns of America, Inc.* v. *Frank*, 541 F.2d 759, 766 (8th Cir. 1976), cert. denied, 430 U.S. 945 (1977)).[26]

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[25] In *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d at 142 n.76, the court of appeals observed that there was some confusion surrounding the question of which interests are relevant to the zone test. While we fail to understand the basis for the confusion, we agree entirely with the court's resolution of the question (*ibid.*):

> Essentially the confusion surrounds what exactly has to fall within the relevant zone: 1) the parties themselves; 2) the interests of the parties in general; or 3) the particular interest the parties are asserting in the litigation. It seems clear to us that the particular interests are the relevant interests in the context of an application of the zone standard. Professor Davis agrees. [K. Davis, *Administrative Law Treatise* § 22.00-1 (Supp. 1970)]

In this case, therefore, the fact that respondents are consumers is irrelevant for standing purposes, as is the fact that they may possess a general interest in the price of food. Rather, the relevant focus is on their interest in lower retail prices for reconstituted milk and the relationship of that interest to the purposes of the AMAA.

[26] *Rodeway Inns* is particularly relevant to the instant case. There, the court was confronted with a statute that did provide limited protection for the plaintiff group, but not for the interest sought to be asserted in the litigation. In denying standing, the court stated (541 F.2d at 766 (emphasis added)):

> We cannot conclude that two provisions which protect the interests of potential competitors in limited situations were intended by Congress to confer standing on competitors to challenge action taken under the [National Housing Act] not falling within the areas protected by those two particular provisions. * * * The provisions protecting hotel owners are of limited application only; *it is not our prerogative to expand*

Here, respondents assert an interest (lower retail prices) that is at best essentially unrelated to, and at worst the direct opposite of, what Congress intended to achieve (higher prices for farmers). The zone of interests test clearly bars standing under these circumstances.[27]

B. Respondents Cannot Demonstrate Injury In Fact Caused By Any Fluctuation In Milk Supplies

The court of appeals also erred in concluding that the consumer respondents satisfactorily established their standing to maintain this suit through their allegation that the market order provisions at issue "deprive producers and consumers of a stabilizing market influence" (J.A. 17). Ensuring stable market conditions *is* an express purpose of the statute (see 7 U.S.C. 602(4)), and thus this facet of respondents' asserted injury is arguably within the Act's zone of interests.[28] The problem here,

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the scope of hotel owners' interests beyond the zones of protection defined by Congress.

So too, it is not the proper function of the judiciary to expand upon the limited protection Congress intended to provide for consumers in the AMAA.

[27] As noted at the outset (see page 17, *supra*), respondents brought this action under the Administrative Procedure Act. That Act grants standing only to persons "adversely affected or aggrieved by agency action *within the meaning of a relevant statute* * * *" (5 U.S.C. 702 (emphasis added)). The plain language of the APA thus incorporates a "zone of interests" test that respondents cannot meet; assuming, arguendo, that respondents have suffered injury at all, it is, as we have shown, injury that is not cognizable within the meaning of the AMAA.

[28] The legislative history indicates, however, that, as with prices, Congress's intention to promote market stability was meant to protect *farmers* rather than consumers. See H.R. Rep. 1241, *supra*, at 10 (emphasis added) ("In order to eliminate, so far as possible, violent seasonal fluctuations in the available milk supply *with their attendant disturbing effect upon returns to producers*, and to encourage a uniform volume of production throughout the year, an adjustment in payments to producers" may be made.). See also *Suntex Dairy* v. *Bergland*, 591 F.2d at 1064-1065 (emphasis added)

however, is that respondents essentially did no more than parrot the language of the statute. Even then, their allegation of injury was entirely speculative and hypothetical; they asserted that "[a] reconstituted fluid product *could* quickly expand the fluid milk supply when seasonable changes result in a reduction of the whole fluid milk supply" (J.A. 17 (emphasis added)). Plainly, this is insufficient to demonstrate the constitutionally-required injury in fact. Respondents did not allege that they (or, for that matter, any other consumers) have ever been or are likely to be subjected to shortages in fluid milk supplies due to seasonal variations in production. This is a fatal defect. See *Warth* v. *Seldin*, 422 U.S. at 498-499, 504.

Moreover, any allegation that the consumer respondents have in fact suffered or are likely to suffer from seasonal shortages would be untenable. There are indeed seasonal fluctuations in the production of milk, but a number of regulatory mechanisms operate to prevent those fluctuations from affecting ultimate consumers.[29]

("The blend price mechanism established by a milk marketing order acts as a stabilizing influence that insulates *farmers* from the buffeting of prices that would otherwise accompany differences in consumer demand.").

[29] Many market orders establish a "base" system for allocating payments from handlers to producers. See 7 U.S.C. 608c(5)(B); H.R. Rep. 1241, *supra*, at 9-10. Adjustments to the base system may authorize higher payments for milk produced during seasonal low periods and thus provide incentives to counteract fluctuating production levels. *Id.* at 10. Second, the price paid to rural producers may include a premium to provide them with an incentive to ship their milk to city markets whenever necessary. *Id.* at 9-10. Third, the price support system, an entirely separate statutory scheme regulating milk production (see 7 U.S.C. 1421-1449), has kept the supply of milk high year round. In fact, since the fall of 1979, there has been a dramatic increase in milk production without a concomitant increase in demand. See *State of South Carolina ex rel. Tindal* v. *Block*, 717 F.2d 874, 877-878 (4th Cir. 1983), petition for cert. pending, No. 83-1215; 48 Fed. Reg. 34943 (1983). During fiscal year 1982, the government purchased nearly $845 million in surplus milk products under the price support system. As a result

Under these circumstances, respondents were required to come forward with facts supporting their claimed injury. They utterly failed to do so with respect to their market stabilization claim, and that claim must therefore be disregarded as "unadorned speculation" (*Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 44 (1976)). See *Warth* v. *Seldin*, 422 U.S. at 501-502.

C. Respondents Are Attempting To Litigate A Generalized Grievance More Appropriately Addressed By Congress

The court of appeals recognized that the interests asserted by the consumer respondents in this case are widely shared (Pet. App. 25a); indeed, those interests appear to be shared by virtually every household in the country, a class even larger than that of all taxpayers. Nevertheless, the court of appeals concluded that dismissal of the suit on "generalized grievance" grounds would mean that consumer suits would never be justiciable (*ibid.*). As this Court has held, however, "'[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.'" *Valley Forge*, 454 U.S. at 489 (quoting *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974)). Even if this were not so, the court of appeals was clearly wrong in the context of this case. As stressed by Judge Scalia in dissent (Pet. App. 38a-40a), consumer interests in milk market orders are entirely derivative of handlers' interests and can be fully protected by handlers' suits (brought after proper exhaustion of administrative remedies). Handlers are the "litigants best suited to assert [the] particular claim" that is here only indirectly shared by the consumer respondents. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979).

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of these various factors, there is no experience within general knowledge or subject to judicial notice of a shortage of fluid milk at the consumer level due to seasonal fluctuations in production.

Moreover, Congress, when it chooses, can and does overcome prudential limitations on standing such as the generalized grievance doctrine by extending standing to any person adversely affected or aggrieved by the challenged action. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 100; see also Sedler, *Sanding and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 Rutgers L. Rev. 863, 876-885 (1977). As we have already demonstrated, however, Congress has not chosen to do so in the AMAA. If the consumer respondents in this case are held to have standing, the effect would be to add a boundlessly latitudinal "person aggrieved" standing provision to the AMAA. Granting standing to consumers whose interests are indirect and shared in common with virtually every household in the nation would undermine the statutory scheme enacted by Congress and would disrupt a massive program that has stability as a primary goal. See, *e.g.*, 7 U.S.C. 601. Such a dramatic change in a regulatory program of 50 years' duration is "most appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 475.

D. Respondents Cannot Demonstrate That Their Injury, If Any, Is Redressable By A Court

To establish standing, a litigant must demonstrate that his individualized injury " 'is likely to be redressed by a favorable decision' " (*Valley Forge*, 454 U.S. at 472 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38)) and that he "personally would benefit in a tangible way from the court's intervention" (*Warth* v. *Seldin*, 422 U.S. at 508 (footnote omitted)). Standing is not established when it is "speculative whether the desired exercise of the court's remedial powers" would benefit the plaintiff. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 43; see *id.* at 44-46.

Here, it is entirely speculative whether the pocketbooks of the nation's consumers would be augmented in

any way by upholding respondents' challenge to the milk market orders. Congress has recognized that retail prices paid by consumers are largely independent of the wholesale prices paid to farmers. H.R. Rep. 1927, 83d Cong., 2d Sess. 7, 9 (1954). Any connection between amendment of the market orders and lower retail prices at the consumer level, therefore, is "at best speculative and at worst nonexistent." *Valley Forge*, 454 U.S. at 480 n.17. As the district court explained (Pet. App. 61a):

> There are too many variables which would have an effect on consumer prices if the Market Orders were changed. These variables include: whether handlers pass the cost savings on to consumers; whether the change causes a substantial market dislocation, leading to higher overall milk prices; whether increased demand for milk powder will increase its price; whether handlers would dry milk merely to evade the regulations. This situation is, as the Preliminary Impact Statement, 45 Fed. Reg. 75,956 (1980), indicates, extremely complex, and any benefit to the plaintiffs from the proposed changes in the regulations is hypothetical and speculative.[30]

The court of appeals disagreed with these observations based solely on the Department of Agriculture's preliminary impact analysis of respondents' proposal (45 Fed. Reg. 75956 (1980)), which the court read as showing

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[30] Congress recognized these same factors as early as 1935. During debate on the 1935 amendments to the AAA, the following colloquy occurred (79 Cong. Rec. 9470 (1935)):

> Mr. ZIONCHECK: * * * Is there any provision in the bill for a maximum cost to the consumer?
>
> Mr. DOXEY: If the gentleman can show us how we can fix a maximum cost to the consumer, after the many people through whose hands the commodity passes, I am sure as one Member I would be grateful for his contribution. No; there is nothing in the bill which fixes a maximum cost to the consumer. That is to be left to competition and the law of supply and demand.

that the immediate (*i.e.*, within three years) impact of adopting respondents' proposal would be to save consumers nationwide $186 million annually (Pet. App. 17a). But the court misunderstood the impact analysis. In fact, the analysis offers no evidence regarding the likely behavior of the many nonregulated parties intervening between producers and ultimate consumers, whose actions necessarily determine the redressability of respondents' grievance. Rather, for purposes of studying respondents' proposal, the Secretary analyzed the impact on the producer-through-consumer chain as if all independent, intervening variables would operate to the benefit of consumers. The Secretary's impact analysis states that it took this approach because it was impossible to measure or predict accurately the future actions of the intervening third parties (see 45 Fed. Reg. 75960, 75963 (1980)). Thus, the Secretary assumed that all wholesale cost savings would be passed through to retail prices,[31] that consumers would accept manufacturer-reconstituted milk, that it would be made available by wholesalers and retailers in fresh milk markets,[32] and that state regulations would not prohibit its sale.[33] Ac-

[31] The preliminary impact statement reports that in its analysis "farm to retail margins are held constant." 45 Fed. Reg. 75963 (1980).

[32] With respect to consumer acceptance and availability, the impact analysis states (45 Fed. Reg. 75960 (1980)):

> While the model does make it possible to estimate a broad range of economic impacts, others cannot be measured because no data are available. The most important of these is the acceptability of reconstituted milk by consumers and the extent to which such a product would be sold in each of the fresh milk markets across the U.S.

[33] The impact analysis notes that 15 states prohibit the manufacture and sale of reconstituted milk in whole or in part and an additional ten states regulate its price (45 Fed. Reg. 75962 (1980)). The analysis further states (*id.* at 75963):

> Because it is not possible to measure the potential impact of state regulation on the alternative proposals, this analysis relies

cordingly, the preliminary impact analysis merely confirms the speculative nature of any assumption that a change in the market orders would benefit consumers, and it cannot satisfy the Article III requirement of redressability.

Finally, because the redressability of respondents' indirect injury is unrelated to the merits of their claim, it is essential that they be required to demonstrate that a court's intervention will result in some tangible benefit to them *before* they call upon the judiciary to oversee the extraordinarily complex market order system administered by the Secretary. At minimum, therefore, the court below erred in remanding this case for a decision on the merits when respondents have not yet shown (even to the court of appeals' satisfaction (see Pet. App. 18a-19a)) that a judgment in their favor would produce the relief they seek. Requiring respondents to establish their standing before trial is particularly important in this case because a trial on the merits would likely be devoted to issues wholly unrelated to respondents' standing. Indeed, the court of appeals itself recognized that the questions to be resolved on the merits are narrow in scope (Pet. App. 34a n.95 (emphasis in original)): "The compensatory payment regulation should be sustained if it is within the Secretary's granted power, issued pursuant to proper procedure, and supported by adequate evidence and reason *when adopted*." In these circumstances, a trial on the merits is not likely to produce any evidence supportive of respondents' standing allegations. As a result, respondents should not be allowed to proceed until and unless the defects in the standing allegations

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upon * * * impacts that would be expected in the absence of state regulations to prevent the sale of reconstituted milk.

* * * * *

Because the likelihood of success of such efforts [to change state restrictions] is impossible to predict or measure, no estimates of their impacts are presented.

have been corrected. See *Warth* v. *Seldin*, 422 U.S. at 501-502.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 83-458

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, and UNITED STATES DEPARTMENT OF AGRICULTURE,

Petitioners,

v.

COMMUNITY NUTRITION INSTITUTE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act (7 U.S.C. § 601 *et seq.*) provides procedural and substantive requirements which the Secretary of Agriculture must follow in issuing market orders. 7 U.S.C. § 608c. The questions presented in the order in which they should be considered are:

1. Whether consumers of fluid milk, who assert interests that are protected by the Agricultural Marketing Agreement Act, have standing to seek judicial review of milk market orders issued under that Act.

2. Whether the statutory scheme for reviewing milk market orders precludes judicial review by consumers under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*

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BRIEF FOR THE RESPONDENTS

STATEMENT

This case involves the right of respondents Ralph Desmarais, Deborah Harrell and Zy Weinberg to challenge regulations promulgated by petitioner Secretary of Agriculture (the "Secretary"), the effect of which is to preclude them from buying reconstituted milk. Reconstituted milk is a milk product manufactured by combining water with whole or nonfat milk powder. In some cases butterfat or nondairy fats, such as coconut oil or soybean oil, may be added. Although it can be manufactured in a manner that makes it "nearly indistinguishable from fresh fluid milk," Federal and state laws require labeling which clearly differentiates reconstituted milk from fresh fluid milk. 45 Fed. Reg. 75956, 75960-61 (1980).

Respondents are three cost-conscious consumers of fresh fluid milk who desire to buy reconstituted milk but cannot do so because the Secretary's regulations create insuperable trade barriers to the marketing of reconstituted milk in the areas of the country in which they reside. In areas of the country not subject to such regulations, reconstituted milk has been sold to consumers at prices substantially lower than the prices of fresh fluid milk.[1] Despite the significant impact that the Secretary's regulations have on respondents, petitioners (the Secretary and the Department of Agriculture) assert that respondents have no right to obtain judicial review, under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"), of the legality of the regulations under the Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq.* ("AMAA").[2]

A. The Impact Of The Challenged Milk Market Orders

The regulations at issue are part of a comprehensive set of regulations, referred to as milk market orders, that establish minimum prices that handlers (middlemen who process or "handle" milk) in a given geographic region, or "order area," must pay milk producers (dairy farmers) in that same area. The Secretary has established milk mar-

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[1] According to the Secretary, reconstituted milk is sold in Alaska by a major Alaskan dairy "for about 15 to 20 cents per half gallon less than Alaskan produced fresh milk sold by that dairy's competitors." 45 Fed. Reg. 75956, 75960 (1980). In addition, prior to its merger with a dairy cooperative, a North Carolina dairy priced its reconstituted milk "about 10 cents per gallon below fresh fluid milk prices in that market." *Id.*

[2] The relevant provisions of the AMAA are set forth in Pet. App. at 69a-95a. (References to "Pet. App." are to the Appendix submitted as part of the Petition for A Writ of Certiorari).

ket orders for 45 geographic areas, thereby encompassing most of the nation. See 7 C.F.R. Parts 1001-1139 (1983). Although the 45 milk market orders vary in form and wording, they contain substantially the same provisions with regard to reconstituted milk.[3]

The purpose of these regulations is to assure that producers within a region receive a uniform minimum price for the fresh fluid milk they sell to regional handlers, regardless of how the fresh fluid milk is used by the handlers. See 7 U.S.C. § 608c(5). To this end, handlers do not pay the producers directly, but instead make payments into a regional pool, which is then distributed among the regional producers. 45 Fed. Reg. 75956, 75959 (1980). The amount that the handler pays is based on the use to which the handler puts the milk. *Id.* at 75958. If the milk is sold as fresh milk for fluid consumption, the handler pays the higher Class I price. *Id.* If the handler uses the milk to manufacture milk products, such as milk powder, cheese, or evaporated milk, the handler pays the lower Class II price. *Id.*

The regulations at issue in this case protect regionally produced fresh fluid milk by imposing a tax, called a

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[3] Milk market orders may be issued only after notice of proposed rulemaking and an opportunity for hearing (7 U.S.C. § 608c(3)), and upon the Secretary's finding that issuance of the order will tend to effectuate the declared policy of the AMAA. 7 U.S.C. § 608c(4). However, before the Secretary may issue a milk market order, two-thirds of the region's producers must approve it. 7 U.S.C. § 608c(9)(B).

Federal milk market orders apply to Grade A milk. Grade B milk (milk that is produced under less stringent farm sanitation standards than Grade A) cannot be sold for drinking purposes and is not regulated under the federal milk market orders. 45 Fed. Reg. 75956, 75958 (1980).

compensatory payment, on reconstituted milk, which otherwise would compete with fresh fluid milk in those markets. If a handler purchases milk powder from outside the order area and manufactures it into reconstituted milk, then under the regulations, he must report to the Department of Agriculture the amount of reconstituted milk he sells within the order area.[4]

In a process referred to as "down allocation," the regulations adopt the fiction that a handler will use reconstituted milk to manufacture Class II products,[5] but if the handler's records show that he has not manufactured enough Class II products to account for all the reconstituted milk, he is required to make a compensatory payment on the remainder.[6] The compensatory payment is equal to the difference between the higher Class I prices and the lower Class II prices. The compensatory payment is not distributed to the producers of the milk in the region where the milk powder was made. Instead, it is deposited into a pool for distribution to the producers of fresh fluid milk in the region where the reconstituted milk was manufactured and sold.[7]

It is undisputed that this pricing scheme has the effect of raising the handlers' cost of manufacturing reconsti-

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[4] 7 C.F.R. § 1012.30(b)(2) (1983). To illustrate the regulatory framework, respondents use the Tampa Bay Order, and citations to the Code of Federal Regulations refer to the relevant sections of that Order.

[5] See, e.g., 7 C.F.R. § 1012.44(a)(3)(iv) and (v) (1983).

[6] 7 C.F.R. § 1012.60(e) (1983).

[7] 7 C.F.R. § 1012.71(a) (1983). The regulations similarly prevent a handler from manufacturing reconstituted milk from milk powder produced from his own order area's fresh fluid milk. See 44 Fed. Reg. 65989, 65990 (1979).

tuted milk. Pet. App. at 5a. In each of the order areas in which the respondents reside (Central Arkansas, Texas and Tampa Bay), the compensatory payment makes it more costly for handlers to manufacture reconstituted milk than to purchase fresh fluid milk. Supplemental Affidavit of Thomas B. Smith ¶ 11, J.A. at 79-80. As shown in the following table, which is derived from evidence presented to the district court, based on April 1981 prices in the areas where respondents reside, the cost of manufacturing 100 pounds of reconstituted milk, including the compensatory payment, ranged from \$1.43 to \$1.56 *above* the Class I price of fresh fluid milk. Without the compensatory payment, the cost of the reconstituted milk would be \$.48 to \$1.32 *below* the Class I price of fresh fluid milk.[8]

April 1981 Prices
Cost Of Manufacturing 100 Pounds
Of Reconstituted Milk Compared
With Prices Of Fresh Fluid Skim Milk
(In Dollars)

Area	Federal Order Class I Price For Fresh Fluid Skim Milk	Cost Of Reconstituted Milk With Compensatory Payment	Compensatory Payment	Cost Of Reconstituted Milk Without Compensatory Payment
Central Arkansas	8.68	10.11	1.91	8.20
Texas	9.05	10.61	2.29	8.32
Tampa Bay, Florida	9.68	11.13	2.77	8.36

[8] The manufacturing cost includes the cost of the milk powder, the cost of transporting the powder from the area where it is produced to the area where it is reconstituted, the cost of warehousing the powder until it is used, and the cost of processing the powder into reconstituted milk. Affidavit of Thomas B. Smith ¶ 10, J.A. at 66.

Supplemental Affidavit of Thomas B. Smith ¶ 11, J.A. at 79-80.

The effects of this pricing scheme on respondents are two-fold: (i) it deprives them of the lower-cost reconstituted alternative; and (ii) it deprives them of the stabilizing influence that would be provided by the marketing in regions such as theirs, of reconstituted milk made from milk powder derived from regions of the country where milk supplies are more bountiful. Complaint ¶¶ 7, 26-28 and 31, J.A. at 12 and 16-17; Comments of the Antitrust Division, U.S. Dep't of Justice (Jan. 15, 1980), J.A. at 24-27; Comments of the Council on Wage & Price Stability (Feb. 29, 1980), J.A. at 30-34 and 41.

B. The Agricultural Marketing Agreement Act

The Secretary's authority to issue milk market orders was first enacted as part of the Agricultural Adjustment Act of 1933, ch. 25, §§ 8(3), (4), and (5), 48 Stat. 35. Significant amendments were enacted two years later as part of the Agricultural Adjustment Act of 1935 (ch. 641, 49 Stat. 750) because of the "delegation" problems brought to light by the then recent decision in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). At that time Congress revised the milk marketing provisions to make it clear that the Secretary's authority was limited by rules established by Congress. H.R. Rep. No. 1241, 74th Cong., 1st Sess. 3 (1935).[9]

The regulations at issue in this case are not expressly authorized by the AMAA. The Secretary's express au-

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[9] The 1935 Act was subsequently reenacted as part of the Agricultural Marketing Agreement Act of 1937, which reaffirmed the marketing order provisions of the 1935 law after a provision on processing taxes had been struck down as unconstitutional in *United States* v. *Butler*, 297 U.S. 1 (1935).

thority to set minimum prices applies only to fresh fluid milk sold by producers, and not products made from milk, such as reconstituted milk.[10] The AMAA does, however, include incidental rulemaking authority which may be exercised when necessary to carry out the provisions expressly authorized by the statute. 7 U.S.C. § 608c(7)(D). It is under this authority that the reconstituted milk regulations have been issued.

The incidental rulemaking authority, like the express authority, is constrained by various provisions of the AMAA. Congress carefully defined the policy objectives of the statute in Section 2 of the AMAA,[11] and prohibited

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[10] 7 U.S.C. § 608c(5)(A) authorizes the Secretary to issue orders:

> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers.

[11] Section 2 reads in pertinent part as follows:

> It is declared to be the policy of Congress—
>
> * * *
>
> (2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.
>
> * * *
>
> (4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural

the Secretary from issuing any market orders that do not tend to effectuate that declared policy. 7 U.S.C. §§ 602 and 608c(4). Moreover, Congress also specifically required the Secretary to terminate or suspend any market order that obstructs or no longer tends to effectuate the statutory policy objectives. 7 U.S.C. § 608c(16).

Two of the five objectives of the AMAA are directly intended to "protect the health and purses of consumers." *Schepps Dairy* v. *Bergland*, 628 F.2d 11, 19 (D.C. Cir. 1979). The first of these authorizes the Secretary to set producer prices no higher than is necessary to stabilize market conditions and give producers a fair return on their investment. 7 U.S.C. § 602(2); H.R. Rep. No. 6, 73d Cong., 1st Sess. 7 (1933). Anything more would be unfair to consumers and outside the limits of the Secretary's authority. *Id.* at 6-7. In furtherance of the interests of consumers, the second provision, added to the AMAA in 1954, instructs the Secretary to establish market conditions that will avoid unreasonable fluctuations in milk prices and supplies. 7 U.S.C. § 602(4).

The Secretary's rulemaking authority is further constrained by 7 U.S.C. § 608c(5)(G), which prohibits the Secretary from erecting barriers to the marketing of milk and milk products.[12] Thus, in *Lehigh Valley Cooperative*

> commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

7 U.S.C. §§ 602(2) and (4).

[12] 7 U.S.C. § 608c(5)(G) provides:

> No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or milk product thereof produced in any production area in the United States.

Farmers v. *United States*, 370 U.S. 76, 97 (1962), this Court held that this prohibition "refers not merely to absolute or quota physical restrictions, but also encompasses economic trade barriers."[13]

As the Secretary acknowledges, this regulatory scheme affects the interests of producers, handlers and consumers. 45 Fed. Reg. 75956, 75958 (1980). Producers are the beneficiaries of the minimum prices that handlers must pay under the system, and it is consumers who ultimately must bear the cost, both in terms of the prices they must pay and in terms of the unavailability of products that cannot be competitively marketed. Yet, the AMAA does not expressly provide producers or consumers with either administrative or judicial remedies to challenge the legality of market orders.

The AMAA does, however, expressly provide handlers with both administrative and judicial remedies. Handlers may challenge a market order by petition to the Secretary and are provided a formal adjudicatory hearing before an administrative law judge (7 U.S.C. § 608c(15)(A)), and, upon the Secretary's ruling, they may obtain prompt judicial review. 7 U.S.C. § 608c(15)(B). Moreover, 7

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[13] The facts in *Lehigh* are strikingly similar to those in the present case. There the challenged milk market order required handlers bringing in fresh fluid milk from outside the order area to pay the local producer settlement fund a compensatory payment equal to the difference between the higher rate for fresh fluid milk and the lower rate for certain milk products. In *Lehigh* this Court struck down that payment as a prohibition violative of 7 U.S.C. § 608c(5)(G) because it "taxed" the milk outside the order area so that it could not compete with the order area milk. In the instant case respondents have alleged that a similar compensatory payment scheme "limits" the marketing of a milk product, *i.e.*, reconstituted milk, in violation of 7 U.S.C. § 608c(5)(G). Complaint ¶¶ 26-29 and 41, J.A. at 16 and 19.

U.S.C. § 608c(14) protects a handler against the imposition of civil penalties during the pendency of the administrative proceeding, and the handler may disregard the order unless restrained to comply by injunction. 7 U.S.C. §§ 608a(6) and 608c(15)(B). The AMAA, however, does require handlers to exhaust the administrative remedies provided in 7 U.S.C. § 608c(15) before they may commence an action in district court to challenge the validity of a market order. *United States* v. *Ruzicka*, 329 U.S. 287 (1946).[14]

C. The Administrative Proceeding

On August 23, 1979, respondents and others filed a petition with the Secretary to eliminate the requirement in milk market orders that manufacturers of reconstituted milk make a compensatory payment to local dairy farmers. C.A. App. at 31.[15] The petition asserted that lower-cost reconstituted milk is unlawfully taxed by the market orders, which results in the unavailability of reconstituted milk to respondents. C.A. App. at 32, 34 and 40-42. The petition also asserted that these portions of the milk market orders (i) are not necessary to effectuate the purposes of the AMAA; (ii) are inconsistent with the policy objectives of 7 U.S.C. § 602; (iii) create trade barriers to milk products prohibited by 7 U.S.C.

[14] *Ruzicka* was decided only two years after the Court had recognized that producers could obtain judicial review of the legality of market orders. *Stark* v. *Wickard*, 321 U.S. 288 (1944). *Ruzicka*, however, dealt "*solely* with the rights of handlers . . . [and] [a]s to *them* the procedural scheme is complete." *United States* v. *Ruzicka*, 329 U.S. 287, 295 (1946) (emphasis added).

[15] Respondents' petition was appended to their complaint as "Exhibit A." (References to "C.A. App." are to the Joint Appendix filed in the court of appeals).

§ 608c(5)(G); and (iv) exceed the statutory authority of the Secretary. C.A. App. at 43-50.

In their petition, respondents provided factual support for their allegations that handlers would manufacture reconstituted milk if the compensatory payment were eliminated, and that the elimination of the compensatory payment would benefit consumers through enhanced price stability and substantial cost-savings over fresh fluid milk.[16] Respondents also pointed to statistical data developed by the Secretary directly contradicting claims that pricing restrictions on reconstituted milk are necessary to protect fresh fluid milk from ruinous competition.[17]

In a November 16, 1979, Federal Register Notice, the Secretary invited comments on a series of questions

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[16] One study relied on by respondents concluded that elimination of the compensatory payment would result in an 18.8¢ per gallon savings to consumers who purchase reconstituted milk instead of fluid milk. See T. Roberts, *Federal Price Regulation of Close Substitutes for Fresh Drinking Milk: History, Economic Analysis, & Welfare Implications* (unpubl. dissertation, U. Wash. 1979), C.A. App. at 41 & n.10. Additional studies were also cited in the petition, which concluded that elimination of the tax on reconstituted milk would result in cost savings to consumers. See J. Hammond, B. Buxton, C. Thraen, *Potential Impacts of Reconstituted Milk on Regional Prices, Utilization and Production* (Agricultural Experiment Station, U. Minn. 1979), C.A. App. at 42 & n.12, 128 and 145; P. MacAvoy (ed.), *Federal Milk Marketing Orders & Price Support* (1976) citing Ippolito and Masson, *The Social Cost of Government Regulation of Milk* 111 (unpubl. paper, 1976), C.A. App. at 42 & n.13.

[17] Among the data cited was a 1977 survey by petitioner United States Department of Agriculture. The survey examined states not operating under the Federal market order system and concluded that the sale of reconstituted products in those states had not resulted in any noticeable adverse effect on dairy producers. C.A. App. at 43-45.

about the potential effects if respondents' petition were adopted. 44 Fed. Reg. 65989, 65990-91 (1979). In response, the Antitrust Division of the Department of Justice indicated that "[t]he lower costs that would result from deregulating reconstituted milk would enable consumers to enjoy lower priced [reconstituted milk] products." J.A. at 25. In addition, the comments of the Council on Wage and Price Stability stated that "[c]onsumers in the aggregate would save." J.A. at 41. Although there would be regional variations in both the degree of reconstituted milk's market penetration and the attendant cost-savings to consumers, it was apparent that there would be savings to consumers in virtually every region of the nation. J.A. at 24-26 and 31-33.

Moreover, the Antitrust Division's comments noted that adoption of respondents' proposal would rationalize national milk production by permitting surplus milk in more efficient production areas of the country to be marketed in less efficient areas, and would promote orderly marketing by stabilizing the price effects of seasonal variation in supply and demand. J.A. at 24-26. The Council on Wage and Price Stability, in its comments, also forecasted that the availability of reconstituted milk would result in increased market stability. J.A. at 34 and 40-41.

On November 17, 1980, the Secretary published a preliminary Impact Statement on the amendments proposed in respondents' petition and invited comment on it. 45 Fed. Reg. 75956 (1980) (the "Impact Statement"). The Impact Statement recognized that "[a]lthough the regulations apply to handlers, the primary impact of the reconstituted milk regulations also falls on the dairy producers and fluid milk consumers in the federal milk order areas." *Id.* at 75958. The Impact Statement also indicated

that removal of the compensatory payment required by the regulations would result, after three years, in substantial market penetration by reconstituted milk, an anticipated annual savings to consumers of about $186 million, and an annual savings to the government of about $165 million. *Id.* at 75971. On the other hand, the Impact Statement also anticipated a loss in cash farm receipts of about $520 million. *Id.*

On April 7, 1981, the Secretary denied respondents' petition. J.A. at 57-63. Even though he acknowledged that adoption of respondents' proposal would result in production of reconstituted milk and cost-savings to consumers, the Secretary determined that on balance the interests of dairy farmers outweighed the interests of consumers. J.A. at 57-63.

D. The Decisions Below

On December 2, 1980, after waiting more than fifteen months for the Secretary to rule on their petition, respondents filed this action in the United States District Court for the District of Columbia seeking judicial review under the APA of the Secretary's reconstituted milk regulations.[18] Specifically, respondents alleged that each is a consumer of fluid dairy products and that the regulations denied them an opportunity to purchase a "lower

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[18] Joining respondents in the action were The Community Nutrition Institute ("CNI"), a non-profit organization, and Joseph Oberweis, a milk handler. The district court's dismissal of CNI and Oberweis was affirmed by the court of appeals, and neither sought review in this Court. Respondents also sought judicial review of the Secretary's failure to act on their petition. Complaint ¶ 46, J.A. at 19. This claim became moot when the Secretary denied respondents' petition four months after the suit was filed. J.A. at 57-63.

priced reconstituted milk product in lieu of raw fluid milk." Complaint ¶¶ 7, 26-28, J.A. at 12, 16. Respondents also alleged that the challenged regulations deprive them of a stabilizing market influence. Complaint ¶ 31, J.A. at 17. Respondents further alleged that the regulations were invalid because:

(i) they are arbitrary, capricious, unsupported by substantial evidence, and unnecessary to effectuate the declared policy of the AMAA; and

(ii) they are in excess of the Secretary's authority in that (a) they create an economic barrier to the marketing of reconstituted milk products and their ingredients in contravention of 7 U.S.C. § 608c(5)(G); (b) they result in non-uniform prices among milk handlers based on use in violation of 7 U.S.C. § 608c(5); and (c) they are inconsistent with and obstruct the declared policy of the AMAA. Complaint ¶¶ 40-42 and 44, J.A. at 18-19. Without reaching the merits of respondents' claims, the district court (Gasch, J.) granted the Secretary's motion to dismiss on the grounds that respondents lacked standing. Pet. App. at 53a-67a.[19]

The court of appeals reversed the district court's order of dismissal of respondents. Judge Wilkey, joined by Judge Tamm, reviewed the regulatory scheme of the AMAA and the constitutional and prudential standing principles in great detail. Pet. App. at 1a-12a. The court of appeals held that respondents had sufficiently alleged injury in fact, causation and redressability, that respondents' interests were within the "zone of interests" of the AMAA, and that, while their injury may be shared by

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[19] While cross-motions for summary judgment were also filed, the district court ruled only on the government's motion to dismiss. Pet. App. at 68a.

many, it was not a generalized grievance. Pet. App. at 13a-26a. The court of appeals also held that there was no basis upon which to conclude that Congress intended to preclude review by consumers. Pet. App. at 26a n.75.

Judge Scalia dissented, in part. Pet. App. at 35a-40a. He did *not* disagree with the majority's conclusion that respondents satisfied the requirements of Article III (injury in fact, causation and redressability). Rather, he claimed that respondents lacked standing because they were within a broad class of individuals who were indirect beneficiaries of the AMAA's restrictions. In so concluding, Judge Scalia placed particular reliance on his perception that respondents' interests were derivative of, and identical to, those of a narrower class of direct beneficiaries, *i.e.*, handlers, who clearly had a right to obtain judicial review.[20]

SUMMARY OF ARGUMENT

1. Respondents' standing is based on the injury that they have suffered and continue to suffer, caused by the regulations of the Secretary, which effectively prohibit the marketing of a lower-cost alternative to fresh fluid milk in the regions in which they reside. Further, the absence of reconstituted milk results in seasonal fluctuations in fresh fluid milk supply, which in turn raises fresh fluid milk prices to respondents. Respondents are "adversely affected" or "aggrieved" persons with standing to obtain judicial review of the Secretary's regulations pursuant to Section 10 of the APA, 5 U.S.C. § 702.

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[20] Judge Scalia's opinion appears to rest on the conclusion that consumer interests are not within the zone of interests of the AMAA. He did not conclude that consumers are precluded from seeking review under the APA.

The allegations of respondents satisfy the constitutional requirements for standing established by this Court. The respondents have been personally injured by their inability to purchase reconstituted milk, a lower-cost alternative to fresh fluid milk. This injury is fairly traceable to the compensatory payment and down allocation requirements contained in the milk market orders, which create insuperable economic barriers to the marketing of reconstituted milk. There is a substantial likelihood that removal of these requirements will result in lowering the cost of reconstituted milk and in its becoming available for purchase. The Secretary's own Impact Statement assumes that this relief will save all consumers, after three years, approximately $186 million annually. Therefore, the injuries alleged by respondents are likely to be redressed by the elimination of the challenged portions of the milk market orders.

Moreover, even though the injuries experienced by respondents may be shared by many, they are definable and discrete and therefore do not constitute a generalized grievance. *Schlesinger* v. *Reservists Committee*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974).

Finally, in satisfaction of the prudentially based zone of interests test, respondents have demonstrated that their interests are arguably within the zone of interests of the AMAA. *Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S. 150 (1970). Indeed, Congress in two of the four policy sections of the AMAA, Sections 2(2) and 2(4), acknowledged the interests of consumers. 7 U.S.C. §§ 602(2) and 602(4). The AMAA also prohibits the Secretary from issuing milk market orders that do not tend to effectuate these policy sections, which recognize the interests of consumers. 7 U.S.C. § 608c(4).

2. This challenge by respondents under the APA is not expressly precluded by the AMAA, and preclusion cannot be inferred. This Court has held that judicial review under the APA will be assumed, and preclusion inferred only upon a showing of "clear and convincing evidence of a contrary legislative intent." *Barlow* v. *Collins*, 397 U.S. 159, 167 (1970).

The government argues that since Congress granted explicit rights of administrative and judicial review only to handlers in the AMAA, Congress intended to preclude review for nonhandlers. This theory is without merit in light of the decisions of this Court in *Stark* v. *Wickard*, 321 U.S. 288 (1944), and its progeny, which recognize that producers have standing to obtain judicial review. While producers and consumers may not have equally intimate interests for purposes of standing, they are both nonhandlers. If producers are provided with the right of judicial review, there is no basis upon which to conclude Congress intended to preclude consumers from seeking judicial relief.

Moreover, there is nothing in the language of the AMAA or the legislative history that even tends to establish any intent of Congress to preclude judicial review by consumers. Absent such a demonstration, the government has not sustained its heavy burden to show that consumers are precluded from seeking judicial review under the APA.

ARGUMENT

I. RESPONDENTS HAVE STANDING

This Court has identified three elements of constitutional standing which any plaintiff must satisfy:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show [1]

> that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and [2] that the injury "fairly can be traced to the challenged action" and [3] "is likely to be redressed by a favorable decision."

Valley Forge Christian College v. *Americans United*, 454 U.S. 464, 472 (1982) (citations omitted). In addition, this Court has established certain prudential requirements, including a determination of whether plaintiffs assert an interest that falls "arguably within the zone of interests" of the statute in question. *Association of Data Processing Service Orgs.*, 397 U.S. at 153. The district court is required, for purposes of standing, to "accept as true all material allegations of the complaint and . . . [to] construe the complaint in favor of the complaining party." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 109 (1979), quoting *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). Plaintiffs' allegations, as substantiated by them,[21] establish the requisite showing.

A. Respondents Have Been Injured In Fact

In order to demonstrate injury in fact, a plaintiff must allege that he has been injured personally. *Warth* v. *Seldin*, 422 U.S. at 499; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977). This injury need not be substantial; it will suffice for a plaintiff to demonstrate "an identifiable trifle." *United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973).[22]

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[21] Respondents supplemented their allegations with affidavits and other evidence. See, e.g., Pet. App. at 16a n.44 and 59a-60a.

[22] For cases under Section 10 of the APA, " '[i]njury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and it serves to distinguish a person with a direct stake in

Respondents Harrell, Desmarais and Weinberg are cost-conscious consumers of fresh fluid milk who reside in Florida, Arkansas and Texas, respectively. They seek to save money on food without sacrificing taste or the nutritional value of their diet. Complaint ¶ 7, J.A. at 12. They brought this action against the Secretary under Section 10 of the APA, 5 U.S.C. § 702, alleging that the challenged regulations violate the AMAA and deprive them of a lower-priced alternative to fresh milk that they would purchase if available. Complaint ¶¶ 7, 26-28, 40-42 and 44, J.A. at 12, 16 and 18-19. Further, they allege that the absence of commercially manufactured reconstituted milk results in seasonal fluctuations in fresh fluid milk supply which results in higher prices to them for fresh fluid milk. Complaint ¶ 31, J.A. at 17.

As the court of appeals noted: "There is no dispute over the adequacy of the connection between the alleged injury and Consumers." Pet. App. at 14a n.39. The loss alleged is personal to respondents and not that of any third party. It is also uncontested that reconstituted milk is not available in the regions in which respondents reside. The existence of such a barrier is sufficient to establish the requisite injury in fact. *Village of Arlington Heights*, 429 U.S. at 261.

Moreover, the Secretary's own Impact Statement substantiates respondents' allegations. 45 Fed. Reg. 75956 (1980). According to that Impact Statement, if the compensatory payment were eliminated, within three years consumers would save $186 million annually in fluid milk expenditures. *Id.* at 75971. See also J.A. at 61. This

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the outcome of a litigation—even though small—from a person with a mere interest in the problem." *United States* v. *SCRAP*, 412 U.S. at 689 n.14.

impact assessment confirmed the conclusions of both the Antitrust Division of the Department of Justice and the Council on Wage and Price Stability, whose comments had been submitted to the Secretary (J.A. at 21-27 and 28-41), and was bolstered by affidavits submitted by respondents. J.A. at 64-68 and 74-81. Not only does this demonstrate the benefit to consumers if the relief sought is granted, but it also demonstrates the loss or injury suffered as a direct result of the challenged regulations.

In dismissing respondents' complaint, however, the district court relied upon the government's assertion that in addition to the $186 million savings to consumers each year after three years, the changes sought by respondents would cost producers $576 million,[23] which might in turn produce " 'a radical change in the Dairy industry' . . . [which] *might* interfere with the public's access to an adequate supply of milk and might result in higher prices for milk products, including milk powder." Pet. App. at 60a (emphasis in original).[24] The district court's

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[23] It should be noted, however, that the Secretary's projection of $186 million in savings to consumers contains a corresponding projection of a $520 million loss to producers. 45 Fed. Reg. 75956, 75971 (1980). The loss to producers of $576 million cited by the district court would occur, according to the Secretary if, in addition to granting respondents' petition, the Secretary also made a complementary change in other milk regulations. In such a case, the savings to consumers would be $399 million, with an additional $230 million savings to the government. *Id.* at 75973.

[24] The district court did not reject the findings of the Impact Statement as being overly speculative. It simply went beyond the analysis to indicate that in the end, consumers "might" be no better off because of the loss to producers. This, however, does not negate or lessen the finding of injury upon which to base a determination of standing. In any event, the Secretary's conclusions concerning an overall effect were contradicted by the comments of the Antitrust

acknowledgement of the potential gain to consumers if reconstituted milk were available, combined with the uncontroverted fact that reconstituted milk is unavailable to respondents, who desire to purchase it, demonstrate the requisite definable, discrete and specific injury.

In characterizing respondents' allegations as "speculative and hypothetical," the government fails to respond to the unavailability of reconstituted milk as a lower-cost alternative to fresh fluid milk. Pet. Br. at 44. Moreover, it also fails to respond to respondents' allegation that "[t]ight fluid markets and rising fluid prices could be avoided and the size of the reserve fresh whole Grade A milk needed to provide the fluid market could be reduced if such adjustments were possible" (Complaint ¶ 31, J.A. at 17), or to the data submitted by respondents to support those allegations. Rather, the government focuses exclusively on the injury suffered from seasonal shortages. Pet. Br. at 44. However, it is the economic injury resulting from price increases attendant to seasonal fluctuations that respondents are alleging as their injury and not the seasonal shortages themselves.

B. The Injury Can Fairly Be Traced To The Secretary's Regulations And Is Likely To Be Redressed By The Relief Sought

In addition to demonstrating injury in fact, a plaintiff must establish that the injury "fairly can be traced to the challenged action." *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 472 (1982), quoting

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Division (J.A. at 24-26), the Council on Wage and Price Stability (J.A. at 33-34), and studies cited by respondents in their petition (see n.16 at 11, *supra*), which indicated that consumers and the national dairy system would benefit from the relief sought.

Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976). That requirement is met here because the challenged regulations stand as the only complete barrier to the marketing of reconstituted milk at lower prices in the regions where the respondents reside.

Respondents need only make a reasonable showing that "but for" defendant's action, the alleged injury would not have occurred. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-75 (1978). Thus, respondents allege that when the compensatory payment is added to the other costs incurred by a handler in producing reconstituted milk, the resulting price makes it unable to compete with fresh fluid milk. Complaint ¶ 26, J.A. at 16. According to the Secretary's own statements, "[w]ith no change in the pricing of reconstituted milk, handlers in most areas would continue to have strong disincentives to use reconstituted milk rather than fresh fluid milk in processing fluid milk products." 45 Fed. Reg. 75956, 75965 (1980). Therefore, it is reasonable to conclude, as did the court of appeals, that "if handlers were not required to make a compensatory payment they would pass the savings on to consumers . . ." Pet. App. at 16a. [25]

Closely related to causation is the final Article III standing requirement that the injury alleged "is likely to be redressed by a favorable decision."[26] The favorable

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[25] Indeed, the Secretary's Impact Statement cited examples where consumers did benefit from such pass-throughs. See 45 Fed. Reg. 75956, 75960 (1980).

[26] *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 472, quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). See also *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 262 (1977).

decision being sought in this action is the elimination of the compensatory payment and down allocation requirements that effectively prohibit the marketing of reconstituted milk. Since it is economically infeasible to market reconstituted milk with the addition of a compensatory payment, it is "likely" that the removal of these barriers will result in the availability of reconstituted milk to the respondents.

The elimination of these regulations almost certainly would result in the sale of reconstituted milk at lower prices. The Secretary has indicated that if the regulations are not amended as respondents have requested, there would be no economic incentive for handlers to make reconstituted milk available to consumers. 45 Fed. Reg. at 75965. The Secretary's views reflect those of the Antitrust Division of the Department of Justice. In its comments on the Secretary's Impact Statement, the Antitrust Division stated: "If local handlers could economically turn to reconstituted milk they would substantially undermine the potential market power of local producers and limit their ability to extract premium prices." See Supplemental Affidavit of Thomas B. Smith ¶ 14, J.A. at 80-81, quoting Comments of the Antitrust Division, Dep't of Justice 6 (Feb. 12, 1981).

The district court stated, as the government now does, that there are many variables that may affect consumer prices if the regulations were changed. Pet. Br. at 47. While this may be so, it is, however, undeniable that the market *cannot* operate under the current regulations to provide respondents access to reconstituted milk. The grant of the relief sought will "at least create a substantial probability" that reconstituted milk will be marketed and fresh fluid prices will be stabilized. See *Village of Arlington Heights* v. *Metropolitan Housing Development*

Corp., 429 U.S. 252, 264 (1977), quoting *Warth* v. *Seldin*, 422 U.S. 490, 504 (1975). See also *Duke Power Co.*, 438 U.S. at 81.

Respondents' claim does not suffer the deficiencies found in *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), one of the cases primarily relied upon by the government. The low income taxpayer plaintiffs in *Simon* were denied standing because, even if their requested remedy was granted, "it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services." *Id.* at 43. In the present case, the government has been unable to suggest any plausible reasons why the requested relief will not flow from the removal of the Secretary's regulatory barrier. In contrast, respondents have demonstrated with factual evidence, consistent with the Secretary's own Impact Statement, that the relief sought is likely to occur if the current barriers are removed.

The court of appeals correctly rejected the government's speculation that the elimination of the challenged regulations would not result in the marketing of reconstituted milk. Pet. App. at 16a-18a. Rather, the court accepted the Impact Statement, which established that the elimination of the challenged regulations would probably result in the availability of reconstituted milk and more stable prices for fresh fluid milk. *Id.*

Petitioners now claim, however, that their own Impact Statement should be ignored since it "analyzed the impact on the producer-through-consumer chain as if all independent, intervening variables would operate to the benefit of consumers." Pet. Br. at 48. The Impact Statement was developed and written by the Secretary. The Secretary

should not be able to disavow it now. It contains precisely the facts upon which the current Secretary based his decision rejecting respondents' petition for rulemaking on April 7, 1981. J.A. at 57-63.[27] Further, respondents have submitted independent testimony supporting the analysis of the Impact Statement, e.g., Affidavits of Thomas B. Smith, J.A. at 64-68 and 76-81; and rely on the Secretary's own empirical evidence showing that "handlers in non-regulated areas have manufactured and marketed lower-priced reconstituted milk." Pet. App. at 17a, citing 45 Fed. Reg. 75956, 75971 (1980).

In assessing petitioners' own statements, as well as the independent evidence submitted by respondents, it is important to recognize that the issue before the Court is solely the threshold question of standing, not the correctness of any determination of the ultimate impact of the changes that respondents seek. This important distinction, which the government glosses over, was recognized by the court of appeals when it rejected the district court's conclusions as to redressability:

> As the Supreme Court has observed, a plaintiff is not required to negate every "speculative and hypothetical possibilit[y] . . . in order to demonstrate the likely effectiveness of judicial relief."[52] Requiring Consumers to show more than they did in this case forces them to prove their case in order to acquire standing. This is not what the Constitution requires. The redressability element of Art. III is designed to bar disputes which will not be resolved by judicial

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[27] Indeed, the Secretary stated:

> [T]he impact statement [though based on the 1978 data] nevertheless is useful in portraying the general impacts that might be expected.

J.A. at 60.

action. It does not prevent a court from hearing a case which may ultimately be unsuccessful.

[32] *Duke Power*, 438 U.S. at 78.

Pet. App. at 18a-19a.

Respondents have alleged an injury that is substantiated by the Secretary's own Impact Statement. It is not contested that at least one of the injuries experienced by the respondents, *i.e.*, the unavailability of reconstituted milk, is the direct result of the Secretary's regulations. Finally, there is a "substantial probability" that if the regulations are eliminated, reconstituted milk will become available for purchase by the respondents. Accordingly, the requirements of causation and redressability have been satisfied here.

C. The Respondents' Claims Are Not A Generalized Grievance

The government also asserts that the respondents' claim is a generalized greivance, *i.e.*, a grievance where injury in fact has been established, but where the injury is shared by many others. This Court has used the "generalized grievance" test as the basis for dismissal only where no injury in fact has been demonstrated. See *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 489 (1982); *Schlesinger* v. *Reservists Committee*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974). In those cases, plaintiffs asserted only the interests of taxpayers and citizens generally shared by many and were unable to demonstrate any particularized injury to themselves other than the general effect on the Federal budget and their interests as citizens. In this case, however, respondents have shown the inability to buy a particular product in lieu of the higher priced fresh fluid milk. These injuries are no less specific to them

because they may be shared by many others.[28] As the court of appeals aptly stated:

> Consumers' injury is a generalized grievance only in the sense that it is shared by many other persons, *i.e.*, every other cost-conscious consumer of milk. It may be argued that the widespread nature of the injury requires us to dismiss the claim as a generalized grievance. However, we refuse to believe that the mere fact that a plaintiff's injury is shared by many people requires a court to dismiss his complaint. If dismissal were required in such cases, consumer injuries would never be justiciable because "[c]onsumer injuries, by their very nature tend to be shared in common by many other similarly situated individuals."

Pet. App. at 25a (footnote omitted). This is consistent with this Court's prior decisions interpreting standing under Section 10 of the APA, 5 U.S.C. § 702, that "standing is not to be denied simply because many people suffer the same injury." *United States* v. *SCRAP*, 412 U.S. at 687. See *Sierra Club* v. *Morton*, 405 U.S. 727, 734-38 (1972).

The government, in support of its generalized grievance argument, suggests that to grant standing to respondents would be to grant standing to persons with indirect interests. Pet. Br. at 46.[29] Respondents' interests are not generalized, indirect or derivative of interests better brought to the attention of the courts by others.

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[28] Indeed, given the regional variation in the effects of the regulations at issue, consumers are not affected equally. As shown above, even the three respondents are affected in different degrees. See, e.g., pp. 5-6, *supra*.

[29] The government also suggests that since respondents' claim is generalized, it is more appropriately addressed by Congress, an issue addressed at pp. 35-36, *infra*.

Respondents, as ultimate consumers of products marketed by handlers, cannot be assumed to be protected by handlers. In this case the interests of handlers do not coincide with the interests of respondents. The government has speculated that handlers *may* not reduce prices or even market reconstituted milk if the relief sought by respondents is granted. Pet. Br. at 47. It is, therefore, anomalous for the government at the same time to argue that handlers fully represent the interests of respondents. Pet. Br. at 45. Respondents have an interest that is not otherwise represented, and there is no basis upon which to deny them an opportunity to obtain judicial review of the Secretary's regulations.

Even assuming *arguendo* that handlers' interests are similar to those of consumers, the government's argument still fails. Many interests asserted by one group of individuals also can be asserted by others. The holding requested by the government would create an additional test in APA cases not previously recognized by this Court. The government suggests that not only must a person suffer a redressable injury, but he must not represent interests that are otherwise represented. This theory would greatly restrict standing beyond the requirements established by this Court in *Barlow* v. *Collins*, 397 U.S. 159 (1970), and would be particularly inappropriate in cases, such as this one, brought under the APA.

D. Respondents Satisfy The Zone Of Interests Test

In addition to satisfying the constitutionally required elements of standing, respondents also must demonstrate that they satisfy the prudential elements of standing established by this Court. The government questions whether respondents' interests are "arguably within the zone of interests to be protected or regulated by the

statute . . . in question." *Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970).

The zone of interests test was developed in cases, such as this one, reviewing decisions of administrative agencies, as an alternative to the more restrictive requirement that plaintiffs demonstrate a legal interest in order to obtain standing:

> The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

Id. at 153. This test emanated from Section 10 of the APA, which gives standing to a person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

The court of appeals followed the analysis developed in its prior decision in *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978), in holding that respondents were arguably within the zone of interests included in Sections 2(2) and 2(4) of the AMAA, 7 U.S.C. §§ 602(2) and 602(4), to challenge the Secretary's actions. The court of appeals noted that under the zone of interests test, "a plaintiff was only required to assert an interest 'which *is arguable from the face of the statute*.' Consumers have clearly done this much." Pet. App. at 22a, quoting *Tax Analysts* at 142 (emphasis in original) (footnote omitted). Since 7 U.S.C. § 608c(4) requires the Secretary to find, prior to issuing a milk market order, that the order "will tend to effectuate the declared policy of this chapter," the court of appeals properly looked to the policy of the AMAA to identify the proper zone of interests:

> The declared policies of the AMAA are contained in section 602. Section 602(4) clearly expresses the policy that the Secretary use "the powers conferred . . . under this chapter . . . as will provide in the interests of producers *and consumers*, an orderly supply [of milk] . . . *to avoid unreasonable fluctuations in supplies and prices*." Since Consumers allege that the challenged portion of the milk market orders prohibits the sale of reconstituted milk, resulting in higher milk prices and seasonal shortages, they [respondents] have asserted an interest which is at least "arguably" within the zone of protected interests.

Pet. App. at 22a-23a (emphasis in original) (footnotes omitted).

Congress did not give the Secretary of Agriculture a free rein to take any action which might be in the interest of producers. To the contrary, "the text and legislative history of this statute make it plain that the Secretary was required to operate within the narrow confines of powers expressly granted." *Fairmont Foods Co.* v. *Hardin*, 442 F.2d 762, 766 (D.C. Cir. 1971).

In enacting the AMAA, Congress sought to provide dairy farmers a fair return on their investment which is adequate to assure a stable supply of milk. At the same time, 7 U.S.C. § 602(2) reflects congressional concern that consumers not bear the burden of any regulation that maintains producer prices higher than necessary to accomplish this purpose. By asserting that the existing milk market orders are unnecessary to protect farmers and that the regulations unfairly harm consumers, respondents bring themselves squarely within the zone of interests protected by the statute. See *Schepps Dairy* v. *Bergland*, 628 F.2d 11, 19 (D.C. Cir. 1979) (one of the principal statutory policies of the AMAA is "to protect the health and purses of consumers").

The government nonetheless contends that the court of appeals erred by relying on "isolated statutory references to consumers" and by "eschew[ing] any resort to the legislative history to elucidate the statute's meaning." Pet. Br. at 34-35. Neither is correct. Judge Wilkey, in applying the test refined in *Tax Analysts*, simply held "that a plaintiff was only required to assert an interest 'which is *arguable from the face of the statute.*'" Pet. App. at 22a, quoting *Tax Analysts*, 566 F.2d at 142.[30] The court of appeals did not "chastise[]" the district court for the use of legislative history (Pet. Br. at 11), "refuse[] even to consider it" (Pet. Br. at 15), "disregard[]" the legislative history (Pet. Br. at 36) or "avert its gaze from the legislative history" (Pet. Br. at 37). The court of appeals did not ignore the legislative history; it simply refused to use inconclusive history to contradict interests "arguable from the face of a statute."[31]

Moreover, in this case, legislative analysis does not support the petitioners' position. The government questions the court of appeals' reliance upon Section 2(2) of the AMAA because the section speaks of consumers only in the context of parity pricing, and parity pricing is antithetical to respondents' interest in a lower-cost alternative to fresh fluid milk and stable prices. Pet. Br. at 35. This

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[30] Moreover, the court in *Tax Analysts* recognized that the specific interest to be regulated may not have been considered in the legislative history. 566 F.2d at 142. Thus, here, the technology for reconstituted milk did not exist in the 1930's, and hence, there could not have been any references to lower-cost alternatives to fresh fluid milk, because none existed in commercially usable form.

[31] Pet. App. at 22a. The court of appeals did specifically consider the district court's rejection of Section 2(4)'s "identity of purpose" with 7 U.S.C. § 608c(4) on the basis that it was added in 1954. Pet. App. at 21a.

conclusion is an unreasonably narrow reading of the interests encompassed by Section 2(2). The legislative history relied upon by the government establishes the respondents' interests within the statute. Congress has explained that "[i]n the long run, consumers cannot expect to buy any product at a price which represents less than a fair return to the labor and capital involved in producing the commodity." Pet. Br. at 38, quoting H.R. Rep. 6, 73d Cong., 1st Sess. 7 (1933). Congress went on to conclude: "The consumer as well as the farmer and the businessman have everything to gain from a fair and balanced relationship between production and consumption . . ." *Id.*

Respondents do not, in this case, challenge the legality of the minimum price established by the Secretary for fresh fluid milk, and respondents do not have to demonstrate that the statute creates a legal right to lower prices.[32] At most they have to demonstrate an interest in "a fair and balanced" relationship reflected in Section 2(2) of the AMAA. A reasonable reading of Section 2(2) is that it expresses a general policy that consumers should not pay unreasonably high prices for milk or milk products as a result of the price fixing authority conferred by the AMAA. Certainly respondents assert interests that are arguably within the zone of interests encompassed by Section 2(2) and the legislative history.

The government also seeks to reject respondents' interests under Section 2(4), because that section was not

[32] As the court of appeals noted, the zone of interests test does not require "that there be affirmative evidence that the Congress intended that a plaintiff situated precisely as the plaintiff then standing before the court be regulated or protected." Pet. App. at 23a n.66, quoting *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 142 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

part of the original AMAA, having been added when Congress enacted the Agricultural Act of 1954, ch. 1041, 68 Stat. 906. The government relies on the district court's reasoning that Section 2(4) "dealt primarily with the price supports and parity pricing" and because "[n]owhere in the House Report is the interest of consumers mentioned in relation to Orders regulating commodities." Pet. App. at 62a-63a.[33]

The district court found no mention of Section 2(4) in the House Report, not because the section was not intended to protect the interest of consumers with respect to market orders, but because the provision was added by the Senate. The Senate committee report leaves no doubt that this provision was added because of problems of unreasonable fluctuations in supplies and prices when there was a discontinuity in the operation of marketing agreements and orders. S. Rep. No. 1810, 83d Cong., 2d Sess. 8 (1954). Respondents have a clear interest in such market stability.

The government also argues that respondents are not within the "zone of interests" of the AMAA because their interest in a lower-cost alternative to fresh milk is directly antithetical to the interests of producers, the primary beneficiaries of the AMAA. Pet. Br. at 2.[34] They further

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[33] The legislative history cited by the district court explains the price support and parity price amendments made by the 1954 Act to the Agricultural Act of 1949 and the Agricultural Adjustment Act of 1938. These sections of the legislative history do not purport to explain the amendments made by the 1954 Act to the AMAA.

[34] The zone of interests test may be more restrictive in non-APA cases like *Valley Forge* where the word "arguably" has recently been omitted from the test. However, it is assumed that "arguably" is still part of the test in APA cases. See Pet. App. at 35a-36a (Scalia, J., dissenting).

argue that consumers' interests are derivative of, and "virtually identical" to, those of handlers. Pet. Br. at 29. Therefore, the government suggests that to provide judicial review to respondents would permit the assertion of interests contrary to those of the primary beneficiaries, the producers, and would unnecessarily duplicate the interests asserted by those regulated by the AMAA, the handlers.

The case law does not support the government's attempted categorization of these interests. In many prior decisions, including those of this Court, producers and handlers have aligned themselves in virtually every conceivable combination: producers against producers, handlers against handlers, and handlers and producers together. Indeed, these interests have been aligned for and against the Secretary's market orders. See, e.g., *H.P. Hood & Sons* v. *Whiting Milk Co.*, 307 U.S. 588 (1939) (two producers intervened as defendants in support of the position of the three handler-defendants in an enforcement action brought by the Secretary); *United States* v. *Rock Royal Co-op*, 307 U.S. 533 (1939) (defendants in an enforcement action brought by the Secretary included a proprietary handler and three cooperatives; a cooperative intervened on behalf of the Secretary to defend the market order); *Jones* v. *Bergland*, 440 F. Supp. 485 (E.D. Pa. 1977) (two producers, a federation of cooperative associations and five of the federation's members sought to enjoin a milk market order); *Cranston* v. *Freeman*, 290 F. Supp. 785 (N.D.N.Y. 1968), rev'd and remanded, 428 F.2d 822 (2d Cir. 1970), cert. denied, 401 U.S. 949 (1971) (a class of 250 producers challenged a milk market order; a class of 3000 producers intervened as defendants in support of the order). It is, therefore, not instructive to seek to rigidly align potential parties and the interests to be protected by the statute.

Even assuming that respondents' interests are necessarily antithetical to those of the primary beneficiaries, the producers, it does not follow that consumers fall outside the zone of interests of the statute. The decisions of this Court applying the zone of interests test have recognized the standing of parties whose interests were directly opposed to the interests of the primary beneficiary of the relevant statute. In *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), this Court allowed travel agents to challenge a ruling under the Bank Services Corporation Act, permitting banks to offer travel services to their customers. The Court found that travel agents arguably fall within the zone of interests of the statute even though, as the court of appeals noted, nothing in the statute mentions such an interest, and the legislative history evinces only concern on Congress' part of insuring the stability, liquidity, and safety of banks. *Arnold Tours, Inc.* v. *Camp*, 408 F.2d 1147, 1150-51 (1st Cir. 1969), aff'd, 400 U.S. 45 (1970). Similarly, in *Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S. 150 (1970), companies specializing in data processing were allowed to challenge an administrative order permitting banks to sell computing services to other banks pursuant to a statute concerned only with the well-being of banks.[35]

Finally, the government suggests the "respondents have a remedy, but it lies with Congress rather than with the courts." Pet. Br. at 41. Respondents are not challenging the AMAA; they are challenging regulations issued pursuant to the Secretary's incidental rulemaking au-

[35] The courts have expressly rejected the argument that only the primary beneficiary of a statutory scheme may obtain judicial review of agency decisions. See, e.g., *Rental Housing Ass'n* v. *Hills*, 548 F.2d 388 (1st Cir. 1977).

thority some 30 years after the enactment of the AMAA. Respondents are claiming that the Secretary has violated the terms of the AMAA by creating economic barriers to the marketing of reconstituted milk, and by issuing regulations that both encourage price increases in times of seasonal shortages and preclude the stabilizing effect reconstituted milk would have. This stabilizing effect would result if the regulations did not, in effect, prohibit milk powder from being used to supplement the fresh fluid milk supplies in less efficient milk producing regions. Congress has already spoken on this issue, and respondents are simply asking the courts to enforce the law Congress has already enacted.

II. THE AMAA DOES NOT PRECLUDE CONSUMERS FROM SEEKING JUDICIAL REVIEW OF MILK MARKET ORDERS

A. Preclusion Of Review Is Not Mandated By The Statute

The government argues that even if respondents satisfy the requirements for standing, they are nonetheless precluded from bringing this action because there are legal remedies available to others and Congress intended, by establishing such remedies, to ban consumer challenges. There are a number of reasons why that position is in error. The most important is the very limited scope of preclusion under the APA. Section 10 of the APA provides judicial review to "[a] person . . . adversely affected or aggrieved by agency action within the meaning of the relevant statute . . ." (5 U.S.C. § 702), except to the extent that "statutes preclude judicial review." 5 U.S.C. § 701(a).

It is well established that except where preclusion is explicit on the face of the statute, "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such

was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). This Court has further established that "[a] clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose. . . . It is, however, 'only upon a showing of "clear and convincing evidence" of a *contrary* legislative intent' that the courts should restrict access to judicial review." *Barlow* v. *Collins*, 397 U.S. 159, 167 (1970), quoting *Abbott Labs*, 387 U.S. at 141 (citation omitted) (emphasis added). Moreover, the party asserting nonreviewability has the heavy burden of overcoming the strong presumption in favor of review. *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). See *Abbott Labs*, 387 U.S. at 141; *Morris* v. *Gressette*, 432 U.S. 491, 500-01 (1977).

The government does not and cannot claim that the AMAA explicitly precludes judicial review. Rather, the government asserts that consumers are precluded from seeking judicial review since Congress did not provide them with the explicit right of review granted to handlers under 7 U.S.C. § 608c(15). The principal difficulty with this position is that there is nothing in the AMAA which grants producers the right to seek judicial review. Yet this Court in *Stark* v. *Wickard*, 321 U.S. 288, 309 (1944), recognized the standing of producers to challenge milk market orders.[36]

The government has suggested in various ways that producer standing to challenge milk market orders is limited to their "proprietary interest." Compare Pet. at

[36] Indeed, in *Abbott Labs*, this Court cited *Stark* v. *Wickard* as an example of an early case recognizing the availability of judicial review in the absence of a persuasive reason to believe Congress intended otherwise. 387 U.S. at 140.

20 with Pet. Br. at 30 n.17. The cases are not so limited. Producers may challenge the legality of any order as long as they can meet the three-part test established by the Court in *Barlow* and *Association of Data Processing Service Orgs.* Notwithstanding the Secretary's attempts to limit *Stark* v. *Wickard* to its facts, the overwhelming case law recognizes the right of producers to challenge any aspect of milk market orders that affects them adversely. See, e.g., *Suntex Dairy* v. *Bergland*, 591 F.2d 1063, 1065-66 (5th Cir. 1979); *Consolidated-Tomoka Land Co.* v. *Butz*, 498 F.2d 1208 (5th Cir. 1974) (challenge to procedure utilized in producer referendum). Moreover, the courts have recognized the right of other entities (neither regulated handlers nor producers), including importers and unregulated processors of commodities, to obtain judicial review of market orders.[37]

Rasmussen v. *Hardin*, 461 F.2d 595 (9th Cir.), cert. denied, 409 U.S. 933 (1972), the case primarily relied upon by the government to justify preclusion, was wrongly decided and has not been followed by the Ninth Circuit or in the holdings of other courts. Since *Rasmussen*, the Ninth Circuit has held, regarding other statutes, that "judicial review will not be cut off unless clear and convincing evidence discloses that Congress had both considered and prohibited judicial review of the agency action in question." *Kitchens* v. *Department of Treasury*, 535 F.2d 1197, 1199 (9th Cir. 1976). See *County of Alameda* v. *Weinberger*, 520 F.2d 344, 348 (9th Cir. 1975)

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[37] See *Harry H. Price & Sons, Inc.* v. *Hardin*, 425 F.2d 1137, 1140 (5th Cir. 1970), cert. denied, 400 U.S. 1009 (1971) (unregulated handler of tomatoes has standing to challenge marketing orders and regulations although it is only "indirectly affected"); *Walter Holm & Co.* v. *Hardin*, 449 F.2d 1009 (D.C. Cir. 1971) (tomato importer).

(HEW had the burden of demonstrating that review was prohibited).[38]

The court of appeals in this case examined *Rasmussen* and concluded that preclusion of judicial review for consumers should not be inferred where Congress provided review procedures only for handlers, for "this does not constitute the type of clear and convincing evidence of congressional intent needed to overcome the presumption in favor of judicial review, . . . especially since no legislative history or statutory language is cited." Pet. App. at 26a n.75.[39]

In *Rasmussen*, the Ninth Circuit distinguished *Stark* v. *Wickard* on the grounds that notwithstanding this preclusion theory, a producer had standing to "sue when he was claiming that moneys belonging to him were being improperly diverted to others." 461 F.2d at 600.[40] The government contends that the more direct interest of producers distinguishes them from consumers for pur-

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[38] Dicta in *Suntex Dairy* v. *Bergland*, 591 F.2d 1063 (5th Cir. 1979), suggests that the decision in that case extending standing to producers does not extend to consumers. That decision does not support a preclusion argument because in *Suntex Dairy* the court did not have before it the issue of consumer standing, and itself rejected *Rasmussen's* reasoning that nonhandlers were precluded from seeking judicial review. *Id.* at 1066-67.

[39] It is important to note that the dissent of Judge Scalia, relied upon heavily by the government, did not even mention the preclusion argument. Instead, Judge Scalia's one reference to *Rasmussen* was in the context of a discussion of the weight to be given the policy of Section 2(2) of the AMAA as establishing interests of consumers. Pet. App. at 40a.

[40] In *Rasmussen*, the court stated that all producer standing cases are limited to fact situations identical to *Stark* v. *Wickard*. This, of course, is no longer true. See p. 38, *supra*.

poses of preclusion. However, a strong interest of producers does not itself overcome preclusion if preclusion was the clear and convincing intent of Congress. Often persons with strong interests in the outcome may be precluded from review. See *Statutory Preclusion of Judicial Review Under the Administrative Procedure Act*, 1976 Duke L.J., 431, 432. It is, therefore, not persuasive that producers may in some cases have more intimate interests than consumers or that consumers' interests may be antithetical to the interests of producers.

In addition, there is evidence in the legislative history of the AMAA to demonstrate that it was the intent of Congress to protect consumers. See pp. 31-33, *supra*. Neither the Ninth Circuit in *Rasmussen* nor the government here has presented any legislative history that even suggests a congressional intent to preclude all nonhandlers generally, or consumers in particular, from seeking judicial review. The only legislative history directly cited by the government deals with the need to provide handlers, the primary target of potential enforcement, with "*equitable and expeditious procedures*" to challenge regulations applicable to them. Pet. Br. at 20 (emphasis in Pet. Br.). This does not demonstrate an intent to preclude consumers or anyone else from judicial review. Rather, it simply evinces an intent by Congress to provide a specific course of review for handlers. In providing "equitable and expeditious" review procedures for handlers, Congress nowhere stated or even implied that this meant that others should not be able to seek review.

Producers and consumers do not necessarily stand on the same or equal ground for purposes of seeking judicial review of the AMAA under the constitutional and

prudential elements of the law of standing. They do, however, share one common feature: they both are nonhandlers. Therefore, under the theory of preclusion advanced by the government, if consumers are precluded, producers also must be precluded, which is clearly contrary to the holding of this Court in *Stark* v. *Wickard*.[41] Moreover, even where a statute provides no cause of action, either explicitly or implicitly, review of agency action is generally available under Section 10 of the APA, 5 U.S.C. § 702. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317-18 (1979); *Sierra Club* v. *Peterson*, 705 F.2d 1475 (9th Cir. 1983).

In non-APA cases, the analysis has varied. In antitrust cases, this Court has established that foreseeable beneficiaries of competition have standing to enforce the antitrust laws, even though the laws were primarily designed to protect competitors. *Blue Shield* v. *McCready*, 457 U.S. 465 (1982). See also *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339-41 (1979) (retail consumers as a class had standing where they suffered injury to their "business or

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[41] The courts have held that preclusion requires more than a showing that the statute in question authorizes review by one group but is silent with respect to another. For example, in *Peoples* v. *United States Dept. of Agriculture*, 427 F.2d 561 (D.C. Cir. 1970), plaintiffs, identified as "poor people," sought to challenge the manner in which the Secretary of Agriculture was administering Alabama's food stamp program. The Secretary argued that the plaintiffs were inferentially precluded from judicial review since the food stamp statute provided judicial review only to certain types of food distributors. The D.C. Circuit rejected the argument, noting that "[t]here is no fair implication that granting this special judicial review to food distributors was intended to curtail or negative the judicial review otherwise presumed to be available for the protection of the poor." *Id.* at 565.

property" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15).

The government ignores such cases and, instead, relies primarily on cases where this Court has held that no cause of action was intended to be created. These cases are inapposite in that they deal with the maintenance of private causes of action and do not deal with the issue of standing under Section 10 of the APA, 5 U.S.C. § 702.[42]

This case presents a wholly different context for analysis. In cases brought under the APA, review is presumed unless there is clear and convincing evidence to the contrary. *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970). This is far different than determining if a cause of action is created between private parties or at a particular moment in the administrative process.

B. Policy Considerations Do Not Justify Preclusion

Finally, the government, based upon its own reading of the legislative scheme, asserts that "[s]ound policy reasons support the conclusion that Congress intended the statutory scheme for administrative and judicial review to be exclusive." Pet. Br. at 20. As part of its

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[42] This Court in *Nat'l R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 456 (1974), held that a cause of action did not exist; thus, it did not reach the issue of standing. Similarly, in *Associated General Contractors* v. *Cal. State Council of Carpenters*, 103 S. Ct. 897, 911 (1983), this Court held that a union, since its harm was remote, could not maintain a damage action under the antitrust laws. A cause of action would exist if the injury was direct and non-speculative. In the one APA case cited by the government, this Court read the Voting Rights Act as precluding review by *any* person at a particular phase of the administrative process. *Morris* v. *Gressette*, 432 U.S. 491 (1977). In *Morris*, the issue was one of reviewability and not preclusion of a particular party.

justification, the government contends that the maintenance of the billion dollar per month dairy program, which rests on a delicate balance between the interests of handlers and producers, should be insulated from consumer initiated court review, which would upset that carefully established balance. Pet. Br. at 22-23.[43]

This Court faced similar arguments when it extended standing to producers to challenge the market orders.

> It is suggested that such a ruling puts the agency at the mercy of objectors, since any provisions of the Order may be attacked as unauthorized by each producer. To this objection there are adequate answers. The terms of the Order are largely matters of administrative discretion as to which there is no justiciable right or are clearly unauthorized by a valid act. United States v. Rock Royal Co-op., 307 U.S. 533 . . . . Technical details of the milk business are left to

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[43] The government, after raising the spectre of disruption that supposedly would occur if consumers could seek judicial review, dismisses the disruptive effect of producer suits. First, it suggests that producer suits will be "relatively infrequent" because two-thirds of affected producers must approve each order. Pet. Br. at 32 n.18. However, it only takes a minority, even of one, to bring suit. See, e.g., *Brannan* v. *Stark*, 342 U.S. 451 (1952), where five producers challenged an order that had received support of 99.5057% of the voting producers.

The government's additional suggestion that producer suits "are ordinarily limited to challenges to individual market orders," while consumer suits could attack market orders nationwide, is specious. Pet. Br. at 32 n.18. The government cannot seriously assert that a successful producer attack on the reconstituted milk regulations would have less of an impact than the instant case. The 45 individual market orders in this case are, in most material respects, virtually identical. A challenge to the legality of any one of these market orders by a producer, consumer or handler would have nationwide implications.

> the Secretary and his aides. The expenses of litigation deter frivolous contentions. If numerous parallel cases are filed, the courts have ample authority to stay useless litigation until the determination of a test case.

Stark v. *Wickard*, 321 U.S. 288, 310 (1944).

Equally invalid is the government's argument that granting review to consumers would enable a handler to avoid exhaustion of administrative remedy requirements by aligning himself with a consumer to bring suit in district court. The government appears unconcerned with permitting producers to have direct access to the courts, and circumvention in such cases would be much more likely to occur since many handlers also are producers. See, e.g., *Dairylea Cooperative* v. *Butz*, 504 F.2d 80, 82 (2d Cir. 1974) (Dairylea Cooperative, an association of producers, which also acted as a milk handler, was allowed to seek review without exhausting any administrative remedy). Indeed, it appears that handlers financed the very producer suit permitted in *Stark* v. *Wickard*.[44]

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[44] When that case came back to the Court on the merits of the producer claims, three Justices noted that

> the five farmers [producers] whose names appear as challengers of these provisions are not the persons most interested in sabotaging the Boston milk order. Expenses of this litigation, already more than $25,000 by 1949, have been borne by milk handlers [who under the Court's decision in *Rock Royal*, had no standing to bring this suit in their own name].

Brannan v. *Stark*, 342 U.S. 451, 469 (1952) (Black, J., Reed, J., and Douglas, J., dissenting). See also *Cranston* v. *Freeman*, 290 F. Supp. 785 (N.D.N.Y. 1968), rev'd and remanded, 428 F.2d 822 (2d Cir. 1970), cert. denied, 401 U.S. 949 (1971). (Judge Timbers rejected claims of two members of a class of producers that the class representatives were inadequate because their cooperative association of producers, some of whose members were defendants, solicited those plaintiffs and paid their counsel).

Moreover, this argument overlooks the fact that it is to the handler's advantage to first pursue his remedy before the Secretary. He may be able to avoid altogether a costly and time-consuming court proceeding, and he also may avoid any money penalties for violation of the challenged order during the pendency of his complaint before the Secretary. 7 U.S.C. § 608c(14). By initiating the administrative review process, a handler may continue his current practices until and unless the Secretary affirms the challenged regulation or initiates injunctive action against such handler.[45]

The government also seeks to avoid judicial review by raising essentially a primary jurisdiction argument, under which it requests deference to the administrative agencies. Pet. Br. at 23. This argument ignores three crucial factors. First, this Court has been able to resolve cases under the AMAA, regardless of the identity of the plaintiffs, involving similar technical claims. See *Lehigh Valley Cooperative Farmers* v. *United States*, 370 U.S. 76 (1962).

Second, as the court of appeals noted, "if Congress intended to channel all challenges through the agency, producers should also be required to follow that route. Yet several courts have concluded that challenges by producers may be heard by courts without first being

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[45] Respondents are not handlers, and there is no evidence on the record in this case that the respondents here are fronting for handlers. Joseph Oberweis, the handler dismissed in this case, operates in a milk market area far distant from those in which respondents reside. Further, respondents' activities for the five years since respondents' petition was filed with the Secretary belies any real or imagined benefit that handlers may obtain by having consumers act as front men or women.

considered by the Secretary." Pet. App. at 26a n.75 (citations omitted).

Third, in this action respondents filed a petition with the Secretary, and the Secretary developed an Impact Statement and other substantive responses at the administrative level. Thus, the Secretary has had ample opportunity to consider these issues prior to review in court.

Even the district court could state no more than "it is *not illogical to infer*, as did the court in *Rasmussen*, that Congress intended to preclude consumers from seeking review." Pet. App. at 66a (emphasis added). This falls far short of the clear and convincing standard of congressional intent required by this Court in *Barlow* to find that consumers who otherwise have standing to obtain judicial review are precluded by the AMAA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 83-458

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, AND UNITED STATES DEPARTMENT OF AGRICULTURE, PETITIONERS

v.

COMMUNITY NUTRITION INSTITUTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

As we demonstrated in our opening brief, Congress enacted a carefully-constructed scheme for the orderly review of market orders at the behest of the parties regulated by those orders. Respondents, who are total strangers to the regulatory program, nevertheless seek to challenge restrictions imposed by the Secretary on the regulated parties, and they seek to do so in a manner that would make it unnecessary for the regulated parties ever again to follow the review procedures mandated by Congress. Respondents have offered no legitimate reason for visiting such disruption on Congress's chosen method for enforcement of the AMAA.[1]

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[1] Preliminarily, we note that respondents ask this Court to analyze the two issues presented by this case, preclusion of review and standing, in reverse order (Br. i). Respondents offer no explanation for their

1.a. In response to our argument (Pet. Br. 18-30) that the purposes and structure of the AMAA manifest a congressional intent to preclude consumer challenges to market orders, respondents contend (Br. 36-37, 41) that review is nevertheless available under Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702. Respondents largely choose to ignore the fact that the APA itself incorporates the preclusion doctrine by denying review whenever a relevant statute precludes it. 5 U.S.C. 701(a)(1). In other words, "[a] person is 'adversely affected or aggrieved . . . within the meaning of a relevant statute' only when that statute provides an express or implicit remedy." Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 44 (quoting 5 U.S.C. 702). Thus, the focus of the inquiry in this case must remain on the AMAA; and since an intent to preclude consumer challenges is found in that statute, respondents' reliance on the APA is to no avail.[2]

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approach. In our view, the preclusion question is an issue of statutory construction that logically should be decided first; if Congress intended to preclude ultimate consumers of milk products from challenging market orders, then it becomes unnecessary to consider whether these respondents have standing. See *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 456 (1974) ("[T]he threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party such as the respondent can enforce duties and obligations imposed by the Act; for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action."). See also *id.* at 465 n.13.

[2]Respondents rely (Br. 41) on *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), for their contrary argument. But the Court did not there discuss whether Chrysler had been "adversely affected or aggrieved * * * within the meaning of a relevant statute" (5 U.S.C. 702); instead, the Court considered only whether the challenged action was committed to agency discretion by law. See 441 U.S. at 317-318. That aspect of the APA's preclusion rule (5 U.S.C. 701(a)(2)) is not at issue in this case.

Where, as here, Congress has enacted a detailed and specific scheme for judicial review at the behest of particular parties, resort to the APA by persons outside that scheme would render Congress's chosen procedures meaningless. This Court has never held that the APA may be used by persons such as respondents, who are strangers to the regulatory program, to gain even greater rights to judicial review than the parties expressly accommodated in the underlying statute. It would be perverse indeed if, despite Congress's judgment that handlers should have access to the courts only after full exhaustion of administrative remedies, consumers were permitted to sue the Secretary directly under the APA. Only if the AMAA failed to authorize judicial review of market orders by any party would it make sense to rely on the APA to "fill the gap" created by the statute's silence. Here, however, respondents ask the Court to sanction use of the APA as a means of circumventing Congress's decision that handlers are the proper parties to challenge market orders and then only after they have followed the prescribed administrative procedures. Such a result would be inconsistent with a long line of this Court's decisions rejecting analogous efforts to frustrate carefully constructed congressional schemes for orderly administrative and judicial review. See Pet. Br. 28-29.

Respondents also choose to ignore the fact that the question in this case is party preclusion, not issue preclusion. It is undisputed that a handler, by following the procedures prescribed in the AMAA, may obtain judicial review of the Secretary's market orders.[3] As Judge Scalia recognized in

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[3]Accordingly, respondents' reliance (Br. 37) on *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), is misplaced. There, the Court rejected the Secretary of Labor's contention that Congress meant to prohibit *all* judicial review of his decision not to file suit to set aside an election under Section 402 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 482. *Dunlop*, 421 U.S. at 567, 568.

his dissenting opinion below, "the whole premise" of the liberalized notions of judicial review upon which respondents rely has no applicability when there is a "direct and immediate beneficiary class which can be relied upon to challenge agency disregard of the law" (Pet. App. 38a).[4] With the focus properly on party preclusion, it is clear that the cases cited in our opening brief (at 17-18) and relegated by respondents to a footnote (Br. 42 n.42) are indeed directly relevant. The fundamental problem with respondents' lawsuit is that they are attempting to litigate the rights of handlers, the parties subject to the market orders in question. Respondents themselves are nowhere included in the statutory scheme for the marketing of agricultural commodities, and their interests are entirely derivative of the interests of handlers and producers. There is thus no need to infer a cause of action on their behalf.[5] Indeed, the Court has recently applied the same principle even though

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[4]As respondents note (Br. 39 n.39), Judge Scalia dissented on the theory that respondents lack standing to maintain this action. But his observations with respect to standing are equally pertinent to the party preclusion inquiry in this case.

[5]Respondents rely (Br. 41-42) on *Blue Shield* v. *McCready*, 457 U.S. 465 (1982), and *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979), for the proposition that foreseeable beneficiaries of competition have standing to enforce the antitrust laws. But the antitrust plaintiffs in those cases brought suit under Section 4 of the Clayton Act, 15 U.S.C. 15, which authorizes a private damages action to be brought by "*[a]ny person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" (emphasis added). The judicial review provision contained in the AMAA is not even remotely comparable in scope. Moreover, respondents overlook the Court's characterization of *McCready* and *Reiter* in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, No. 81-334 (Feb. 22, 1983), slip op. 11 n.19: "In each of those cases * * * the actual plaintiff was directly harmed by the defendants' unlawful conduct." In this case, by contrast, respondents are unable to demonstrate any actual, direct harm to themselves as a result of the Secretary's regulations. See Pet. Br. 46-49 and pages 15-17, *infra*.

the parties precluded from bringing suit were within the class specifically protected by the statute. See *Daily Income Fund, Inc.* v. *Fox*, No. 82-1200 (Jan. 18, 1984), slip op. 17-18 (citation omitted) (The statute's "express provision for actions by security holders * * * ensures that, even if the company's directors cannot bring an action in the fund's name, the company's rights under the statute can be fully vindicated by plaintiffs authorized to act on its behalf. For this reason, it is unnecessary to infer a right of action in favor of the corporation in order to serve the statute's 'broad remedial purpose.' "). Here, too, it is unnecessary to infer a right of review in favor of respondents because their interest in challenging market orders can be fully vindicated in litigation brought by handlers.

b. Respondents also argue (Br. 37-41) that consumer suits should be permitted because the courts have allowed producers to challenge market orders even though producers, unlike handlers, have not been granted an express right of judicial review. Respondents recognize (Br. 17) that producers and consumers do not have "equally intimate interests" in regulations issued under the AMAA, but they contend that it is sufficient that consumers share one characteristic in common with producers—neither are handlers (Br. 41). This simplistic assertion ignores the substantial distinctions between producers and consumers.

At the outset, it must be emphasized that the only time this Court has sanctioned a producer suit under the AMAA was in *Stark* v. *Wickard*, 321 U.S. 288 (1944). Respondents do not dispute the fact that the Court's decision in that case turned on the existence of the producers' "definite personal rights" that were "not possessed by the people generally" (*id.* at 304, 309 (footnote omitted)). Nevertheless, respondents assert (Br. 38) that "the overwhelming case law" recognizes the right of producers to challenge any aspect of milk

market orders even if their proprietary interests are not affected. The two lower court decisions relied upon by respondents for this assertion (Br. 38) do not advance their cause.

In *Suntex Dairy* v. *Bergland*, 591 F.2d 1063 (5th Cir. 1979), the court permitted producers to challenge an order of the Secretary that merged six separate milk market orders into one. The effect of the merger was to redistribute income among the producers; the plaintiff producers saw their income lowered because the merger reduced the "blend price" they previously had received for their milk. In these circumstances, the court found the producers' complaint legally indistinguishable from the situation in *Stark*. Significantly, the court emphasized the fact that "[p]roducers * * * have a definite and direct economic stake in a milk market order, distinguishing them from consumers * * *" (591 F.2d at 1067 n.3).

In *Consolidated-Tomoka Land Co.* v. *Butz*, 498 F.2d 1208 (5th Cir. 1974), the court found that more than one-third of the votes cast in a producer referendum pursuant to 7 U.S.C. 608c(8) had been cast by a cooperative not entitled to vote in the referendum. The court specifically approved the district court's finding that it was impossible to determine whether the requisite number of qualified producers had voted for the imposition of the market order at issue (498 F.2d at 1209). Quite clearly, the invalid election completely thwarted Congress's intention that producers should not be subject to a market order unless the producers themselves give their approval. And since the order effectively limited the ability of the plaintiff producers to sell their crop (see 7 C.F.R. Pt. 914 (1971)), their "definite personal rights" were affected.

As the court in *Suntex Dairy* recognized, consumers can demonstrate no such interference with their rights for the simple reason that the Act was not intended to give them

any enforceable rights. Thus, the one common characteristic shared by producers and consumers — neither are handlers — is plainly insufficient to bring respondents within the rationale of *Stark* and its progeny.[6]

c. In the only consumer challenge to a market order of which we are aware, the court held that congressional intent to preclude consumer suits under the AMAA must be inferred from the statutory purposes. *Rasmussen* v. *Hardin*, 461 F.2d 595 (9th Cir.), cert. denied, 409 U.S. 933 (1972). Respondents contend that *Rasmussen* was "wrongly decided" and that it "has not been followed by the Ninth Circuit or in the holdings of other courts" (Br. 38). This argument is specious. Until respondents filed suit in the instant case, *Rasmussen* had so clearly established the law on the subject of congressional intent to preclude consumer challenges to milk market orders that no other consumer suits had been brought. Thus, no other courts had occasion even to consider departing from *Rasmussen*.[7]

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[6]Respondents also cite (Br. 38 n.37) two cases for the proposition that courts have allowed entities that were neither producers nor handlers to challenge market orders issued under the AMAA. *Harry H. Price & Sons, Inc.* v. *Hardin*, 425 F.2d 1137 (5th Cir. 1970), cert. denied, 400 U.S. 1009 (1971); *Walter Holm & Co.* v. *Hardin*, 449 F.2d 1009 (D.C. Cir. 1971). The cases are plainly distinguishable. In each case, the plaintiffs were handlers of tomatoes imported from Mexico. Although they were not directly governed by the challenged market orders, they were subject to the same restrictions as handlers of domestic tomatoes because the regulations resulted in automatic import restrictions that paralleled the domestic regulations. See 7 U.S.C. 608e-1. Thus, the plaintiffs in each case were putative handlers under the AMAA because their handling of imported tomatoes was directly affected by the regulations applicable to handlers of domestic tomatoes. In any event, neither case discussed the issues of preclusion of review or exhaustion of administrative remedies; from the opinions, it appears that those issues were not raised.

[7]The cases respondents cite (Br. 38) to suggest that the Ninth Circuit itself would no longer adhere to *Rasmussen* involved fundamentally different circumstances. In both *Kitchens* v. *Dep't of Treasury, Bureau*

d. We demonstrated in our opening brief (at 25-29) that sanctioning consumer suits would effectively eviscerate the administrative exhaustion requirements imposed on handlers because, as happened in this case, handlers would need only align themselves with consumers or frame their complaint in their capacity as consumers of milk rather than handlers in order to by-pass the administrative process.[8] Respondents offer several unpersuasive arguments in response to our contention.

First, respondents argue (Br. 44) that "circumvention in * * * cases [brought by producers] would be much more likely to occur [than in cases brought by consumers] since many handlers are also producers." Respondents cite *Dairylea Cooperative, Inc.* v. *Butz*, 504 F.2d 80 (2d Cir. 1974), a suit brought by an association of producers that also acted as a milk handler. Respondents totally ignore the fact that the court allowed the association to proceed without first exhausting its administrative remedies because the only

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of Alcohol, Tobacco & Firearms, 535 F.2d 1197 (9th Cir. 1976), and *County of Alameda* v. *Weinberger*, 520 F.2d 344 (9th Cir. 1975), the plaintiffs sued to protect their own direct interests, which were not derivative of the interests of any other party directly regulated or affected by the statutes in question.

[8]Respondents note (Br. 44 & n.44) that handlers apparently financed the producer suit permitted in *Stark* v. *Wickard, supra*. Although we have not inquired, we assume that the individual consumer respondents in this case also have not financed the litigation themselves. Clearly, the costs of the administrative proceedings and this litigation would far exceed any savings the three consumer respondents could possibly hope to obtain in future milk purchases for their personal consumption. (The Department of Agriculture estimated that adoption of respondents' proposal might result in per capita savings of 82 cents per year (J.A. 61).) In any event, the fact that handlers may be financing litigation that they cannot bring themselves is certainly no reason to expand the class of persons entitled to bring such suits. On the contrary, it suggests a strong need to adhere closely to the statutory scheme to prevent further erosion of Congress's intent.

interest it asserted in the litigation was that of the producers it represented (504 F.2d at 83 (emphasis added; citation omitted)):

> *It is true that Dairylea has acted as a handler * * *, but it is not acting as such in this case.* * * * The concern of Dairylea in this action is not the money which it paid into the Producer-Settlement Fund, since its total payments will remain constant whatever the outcome of the case, but with the money collected on behalf of its producer-members as authorized by 7 U.S.C. § 610(b)(1) (1970) which will increase if the action succeeds. *Thus, for purposes of this suit, Dairylea must be deemed a producer suing in its representative capacity * * *.*

Thus, *Dairylea Cooperative* was not a case of handler-producer collusion intended to by-pass the administrative exhaustion requirements.[9]

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[9]Although Dairylea's hybrid status was thus irrelevant to the particular action it sought to maintain, it is worth noting that the court was not particularly pleased that the association's status as a producer meant that it need not exhaust statutory administrative remedies (504 F.2d at 82-83):

> We reluctantly conclude that Dairylea is a producer and as such was not required to exhaust any administrative remedy before invoking the jurisdiction of the District Court and indeed had no administrative remedy to exhaust. Considering the complicated nature of the provisions of the Act and the labyrinthian regulations issued thereunder, it would be most appropriate for Dairylea's complaint to be considered first by the Secretary * * *. While a remand is most inviting and would permit a dismissal of the complaint without reaching the merits, we regretfully find no authority which would justify such action.

The court's lament hardly constitutes a ringing endorsement for any expansion of the class of non-handlers entitled to maintain challenges to market orders.

Second, respondents argue (Br. 45) that it is actually in a handler's interest to pursue the statutory administrative remedies prior to bringing suit. If this were really so, one must ask why Joseph Oberweis (the handler in this case) failed to exhaust his administrative remedies (see Pet. App. 31a-33a) prior to aligning himself with consumers whose complaint the court of appeals ordered to be heard without regard to the statutory exhaustion requirements.

More fundamentally, respondents have provided an incomplete description of the statutory scheme. Citing 7 U.S.C. 608c(14), respondents contend (Br. 45 (footnote omitted)) that by initiating the administrative review process prior to bringing suit a handler "may avoid any money penalties for violation of the challenged order during the pendency of his complaint before the Secretary" and "may continue his current practices unless and until the Secretary affirms the challenged regulation or initiates injunctive action against such handler." In reality, the protection afforded a handler who "continue[s] his current practices" while his administrative challenge is pending is not nearly so sweeping. Section 608c(14) provides only that no *criminal* fines authorized by that subsection may be imposed during the pendency of a good faith handler review petition filed pursuant to 7 U.S.C. 608c(15). But the subsection provides no protection against the imposition of late charges (*e.g.*, 7 C.F.R. 1004.78, 1106.78, 1108.78), and, in the fruit and vegetable area, a handler may be required to forfeit the value of any product handled in violation of a market order (7 U.S.C. 608a(5)).

Respondents' suggestion that handlers are free to continue their current practices until enjoined, while literally true, does little to bring credit to handlers. In this area as in others, voluntary compliance with existing regulations is an essential premise of our legal system. But if handlers nevertheless choose to disregard the law until enjoined, the Act

gives the Secretary ample powers to obtain such injunctions without regard to the pendency of administrative proceedings (7 U.S.C. 608a(6)). Moreover, a court reviewing the Secretary's disposition of a handler's petition for review may not interfere with the Secretary's right to seek injunctive relief. See 7 U.S.C. 608c(15)(B). Thus, it seems most unlikely that a handler would find it in his interest to disregard the terms of a market order until he was "caught" by the Secretary.

Respondents also contend (Br. 45) that deference to the Secretary's expertise should not be a consideration because the courts have managed to resolve some of the highly technical issues arising under the AMAA without benefit of the Secretary's expertise. This argument is frivolous. The fact that courts have been able to decide cases arising under the AMAA says nothing about their ability to decide such cases correctly or expeditiously; in any event, respondents' assertion is hardly sufficient justification to dispense with the Secretary's expertise when Congress has clearly indicated a contrary intent and the courts have consistently recognized the value of having the Secretary's views. See, *e.g., United States* v. *Ruzicka*, 329 U.S. 287 (1946); *Dairylea Cooperative, Inc.* v. *Butz*, 504 F.2d 80 (2d Cir. 1974); *Blair* v. *Freeman*, 370 F.2d 229 (D.C. Cir. 1966).[10]

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[10]Respondents also contend (Br. 46) that their rulemaking petition offered the Secretary sufficient opportunity to apply his expertise to the issues in this case. But as we noted in our opening brief (at 27-28 n.15), the rulemaking that respondents requested would have been an entirely different proceeding from the direct judicial challenge to the regulations that the court of appeals has sanctioned. Respondents themselves must recognize the distinction, because they never sought review of the Secretary's denial of their rulemaking petition; instead, they have persisted in their attempts to litigate their challenge to the regulations directly.

2.a. As we noted in our opening brief (at 33-34), respondents alleged that the challenged market orders injure them in two ways. First, they claimed that the orders deprive them of a nutritious, low-cost substitute for regular fluid milk and, second, they claimed that the orders deprive consumers of a "stabilizing market influence" that could operate to offset seasonal fluctuations in the supply of regular fluid milk. Respondents have now abandoned any claim that they ever have been or will be subjected to seasonal shortages in the *supply* of fresh fluid milk; they contend instead that seasonal fluctuations in milk production result in seasonal *price increases* that cause them economic injury (Br. 21). Thus, respondents' "injury" is now reduced to price alone. As we demonstrated in our opening brief, however, respondents' interest in lower prices is wholly outside the zone of interests arguably protected by the AMAA.[11]

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[11]It is also noteworthy that respondents' newly-characterized "seasonal price fluctuation" argument is totally unsupported by any facts. Respondents have never offered evidence to support the notion that the retail price of fresh fluid milk is subject to seasonal variations. In fact, fluctuations over the last five years in the average retail price of fresh whole milk attributable to seasonal factors were virtually nonexistent —less than a penny per $1.00 spent for fluid milk. Bureau of Labor Statistics, U.S. Dep't of Labor, *Final Seasonal Factors for Seasonal Adjustment of Fresh Whole Milk* (Jan. 1984). This amount is plainly so insignificant that respondents cannot seriously contend that it would even be reflected in retail pricing decisions. Moreover, consumer consumption of fresh whole milk is slightly *greater* in the fall and winter, when production is lowest, than in the flush production periods of spring and summer. Consumer Nutrition Division, Human Nutrition Information Service, U.S. Dep't of Agriculture, *Report No. H-6, Food Consumption: Households in the United States, Seasons and Year 1977-78*, at 19 (June 1983). There is thus no reason to suppose that even the negligible seasonal fluctuation in retail prices that exists is solely attributable to supply factors rather than to reduced consumer demand in the spring and summer months. (We are lodging with the Court and serving on respondents' counsel copies of the pertinent pages of the reports cited in this footnote, as well as the reports cited at page 16, *infra*.)

Respondents, like the court of appeals, rely on a policy section of the AMAA that merely references consumers (7 U.S.C. 602(2)). Respondents assert (Br. 32) that their interest in lower prices for reconstituted milk is protected by that section because the provision "expresses a general policy that consumers should not pay unreasonably high prices for milk or milk products as a result of the price fixing authority conferred by the AMAA." We agree that one of Congress's concerns was to limit the Secretary's ability to increase prices to "unreasonably high" levels. What respondents choose to ignore, however, is the fact that Congress defined in the AMAA precisely what it meant by "unreasonably high prices." In the very same section of the statute relied upon by respondents, Congress stated that the Secretary was to *raise* the prices farmers receive for their milk as rapidly as possible, but that he was to protect consumers by not raising prices above the parity level (7 U.S.C. 602(2)). We noted in our opening brief (at 35-36 n.21) that the market order minimum prices for fresh fluid milk have rarely, if ever, reached parity, and that during the entire pendency of this litigation those prices have been below parity. Respondents do not dispute this point. Thus, their interest in reducing prices below the level that Congress has directed the Secretary to achieve is clearly *not* protected by the statute; on the contrary, they seek to force the Secretary to disregard the congressional directive to *raise* producer prices until parity is achieved. Essentially, respondents are asking the courts to define "reasonable" prices for milk and milk products when Congress has already done so in the statute. This would be inappropriate in any circumstances, but it is clearly impermissible as a basis for standing when respondents are unable to allege that the Secretary has exceeded the statutory definition of reasonable prices.

Respondents' reliance on the other policy section of the AMAA that references consumers (7 U.S.C. 602(4)) is even more misplaced. Respondents contend (Br. 33) that the

Senate Report on this section, which was added to the AMAA in 1954, demonstrates Congress's concern with "problems of unreasonable fluctuations in supplies and prices when there was a discontinuity in the operation of marketing agreements and orders." Respondents are correct about the purposes of the provision, but, inexplicably, they ignore the fact that Congress's response to the problem of discontinuity was to grant the Secretary new authority to raise producer prices *above* parity if necessary to maintain orderly marketing conditions. See S. Rep. 1810, 83d Cong., 2d Sess. 8 (1954); Pet. Br. 40.

It is thus clear, and respondents do not really contend otherwise, that respondents' interests are antithetical to the interests Congress sought to promote in the AMAA.[12] Respondents' answer (Br. 35) is to assert that this Court has permitted parties other than the primary beneficiaries of a statute to challenge agency action under the statute. But our position is not that a statute's zone of interests is limited to

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[12]Respondents twice cite (Br. 8, 30) *Schepps Dairy, Inc.* v. *Bergland*, 628 F.2d 11, 19 (D.C. Cir. 1979) (footnote omitted), in which the court observed that one purpose of the AMAA is "to protect the health and purses of consumers." But the court's authority for this statement was a citation to 7 U.S.C. 602(2) and 608c(18). *Schepps Dairy*, 628 F.2d at 19 n.57. We have discussed Section 602(2) above and shown that it does not embrace respondents' interest in lower prices. The same is true of Section 608c(18). That subsection was intended to make it "explicit that prices in Federal milk orders should be set at levels not only to insure adequate supplies of high quality milk currently, but that price levels established should be such as to assure a level of farm income adequate to maintain the productive capacity in dairying needed to meet anticipated future needs." H.R. Rep. 93-337, 93d Cong., 1st Sess. 63 (1973). Again, therefore, Congress's focus was on protection for farmers' income. Congress intended such protection to benefit consumers by ensuring that they have adequate supplies of wholesome milk; it did not intend for them to upset the system by attempting to lower farmers' income. In any event, *Schepps Dairy* was not a consumer suit; it was filed by a handler who had first exhausted the statutory administrative remedies (see 628 F.2d at 13 & n.2).

"primary beneficiaries"; instead, we contend only that parties who ask the courts to grant them relief that Congress expressly denied cannot logically be thought to fall within the statute's zone of interests. See Pet. Br. 41-43.[13]

b. Respondents also have failed to demonstrate that their asserted injury is likely to be redressed by a decision in their favor. All that respondents are able to allege is that elimination of the challenged regulations would likely make it economically feasible for handlers to manufacture reconstituted milk; they have not shown that a change in the regulations is likely to induce handlers to sell the product they seek or, more importantly, that any cost savings realized by handlers would be passed on to consumers. As demonstrated in our opening brief (at 47-49), these factors are beyond the control of the Secretary no matter how he regulates the price farmers receive for milk used to make reconstituted fluid milk. Indeed, respondents themselves illustrate some of the problems involved by their reliance (Br. 2 n.1) on the experience in an unregulated market in North Carolina. There, a fortified reconstituted milk product achieved consumer acceptance and sold well for several years. But in 1980, the manufacturer simply decided to stop

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[13]In any event, respondents mischaracterize the two decisions of this Court upon which they rely. In both *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), and *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), the Court construed Section 4 of the Bank Service Corporation Act of 1962, 12 U.S.C. (1976 ed.) 1864 (repealed 1982), as providing protection for competitors of national banks. (The statute provided that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks."). Thus, contrary to respondents' contention (Br. 35 (footnote omitted)), the Bank Service Corporation Act was not "a statute concerned only with the well-being of banks." The provisions of the AMAA implicated in this litigation, on the other hand, are indeed concerned solely with the well-being of farmers. Respondents' inability to allege that the Secretary has provided greater protection for farmers than the AMAA mandates is thus fatal to their zone of interests argument.

making it (45 Fed. Reg. 75960 (1980)), a decision for which the Secretary had no responsibility whatsoever.[14]

Respondents rely on the Smith affidavits (J.A. 64-68, 76-81) to support their allegation that the current regulations make it uneconomical for handlers to manufacture reconstituted milk. Assuming, arguendo, that Smith's conclusions are correct (but see J.A. 69-73), nevertheless there is no reason to believe that any savings realized by handlers would be passed on to consumers. The Smith affidavits do not speak to this point, which is crucial to any showing of redressability. As we noted in our opening brief (at 47), Congress was fully aware of the fact that declines in the prices received by farmers do not ordinarily result in reductions in the price of consumer products; instead, handlers generally keep for themselves the savings that respondents seek at the retail level. See, *e.g.*, 77 Cong. Rec. 1394, 1726, 1729 (1933). And price differentials among milk retailers have very little to do with cost; most often, retail price differentials reflect different merchandising policies, such as the use of milk as a loss leader. See Economic Research Service, U.S. Dep't of Agriculture, *Agricultural Economic Report No. 207, Pricing Milk and Dairy Products — Principles, Practices, and Problems* 21 (June 1971). Finally, a number of states control the price of milk at the retail level, even though the federal government does not. See Economic Research Service, U.S. Dep't of Agriculture, *DS-386, Dairy — Outlook and Situation* 26 (Sept. 1981). Taken

[14]We doubt that the Alaskan experience, upon which respondents also rely (Br. 2 n. 1), is typical of conditions that might be expected in the lower 48, where respondents reside. Food prices in Alaska are unique because so many commodities must be obtained from markets outside the State. Thus, reconstituted milk in Alaska is sold "at about the same price as prepackaged fresh milk shipped from the continental U.S." 45 Fed. Reg. 75960 (1980).

together, these factors make respondents' claim of redressability as defective as the ones rejected by this Court in *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 43 (1976), and *Warth* v. *Seldin*, 422 U.S. 490, 502-508 (1975).

Respondents also rely (Br. 23-25), as did the court of appeals, on the Department of Agriculture's preliminary impact analysis of respondents' proposal (45 Fed. Reg. 75956 (1980)). But as we pointed out in our opening brief (at 47-49), the impact statement assumed that all independent, intervening variables necessary to establish respondents' claim of redressability would operate to the benefit of consumers.[15] While this may have been a useful assumption for purposes of discussion, it leaves respondents' assertion of redressability "at best speculative and at worst nonexistent." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 480 n.17 (1982). Moreover, the potential savings for consumers discussed in the impact statement represent theoretical nationwide savings for all consumers of all milk over a three-year period. Respondents have no guarantee that they themselves would share in the projected savings, as if in a trust fund. Plainly, the impact statement is insufficient to confer standing on these respondents.

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[15]Respondents contend (Br. 24-25) that the discussion of the impact statement in our opening brief constitutes an attempt to disavow the Secretary's own document. That is clearly not the case. The impact statement itself repeatedly made clear the speculative nature of any benefits to consumers, and in our brief we simply showed that, in these circumstances, the court of appeals erred in giving the statement's speculations controlling weight.

For the foregoing reasons, and the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1984

No. 83-458-CFX
Status: GRANTED

Title: John R. Block, Secretary of Agriculture, et al., Petitioners
v.
Community Nutrition Institute, et al.

Docketed:
September 16, 1983

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Plesser, Ronald L., Murphy, James R.

Entry	Date	Note	Proceedings and Orders
1	Jul 6 1983		Application for extension of time to file petition and order granting same until September 16, 1983 (Chief Justice, July 8, 1983).
2	Sep 16 1983	G	Petition for writ of certiorari filed.
3	Oct 11 1983		Brief of respondents Natl. Milk Producers, Inc., et al. in support of petition filed.
5	Oct 12 1983		Order extending time to file response to petition until November 4, 1983.
6	Nov 4 1983		Brief of respondents Community Nutrition, et al. in opposition filed.
7	Nov 9 1983		DISTRIBUTED. November 23, 1983
8	Nov 14 1983	X	Reply brief of petitioner Block, Sec. Agric., et al. filed.
9	Nov 28 1983		Petition GRANTED.
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10	Dec 5 1983		Record filed.
11	Dec 5 1983		Certified original record & C.A. proceedings received.
13	Jan 6 1984		Order extending time to file brief of petitioner on the merits until January 27, 1984.
14	Jan 27 1984		Joint appendix filed.
16	Jan 27 1984		Brief of petitioners Block, Sec. Agric., et al. filed.
18	Feb 3 1984		Order extending time to file brief of respondent on the merits until March 9, 1984.
20	Mar 9 1984		Brief of respondents Community Nutrition, et al. filed.
21	Mar 20 1984		SET FOR ARGUMENT. Tuesday, April 24, 1984. (2nd case)
22	Mar 26 1984		CIRCULATED.
23	Apr 5 1984		Lodging received from the Solicitor General.
24	Apr 5 1984	X	Reply brief of petitioners Block, Sec. of Agriculture, et al. filed.
25	Apr 24 1984		ARGUED.